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THE INSTITUTES OF CAPE LAW

THE

INSTITUTES OF CAPE LAW

BEING

A COMPENDIUM OF THE COMMON LAW, DECIDED CASES, AND STATUTE LAW OF THE COLONY OF THE CAPE OF GOOD HOPE.

BOOK III.

THE LAW OF OBLIGATIONS.

PART II.

ACTIONABLE WRONGS.

PART III.

THE DISSOLUTION OR EXTINCTION OF OBLIGATIONS.

BY

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LIST OF ABBREVIATIONS.

Buch. . . .	Buchanan's Supreme Court Reports.
Buch. App. C.	Buchanan's Reports of the Appeal Court Cases.
C.	Justinian's Code.
Cape Times .	The Cape Times Reports.
Const. . . .	Justinian's Constitutions.
D.	Justinian's Digest.
E. D. C. . .	Reports of the Eastern Districts Court.
Foord. . . .	Foord's Supreme Court Reports.
G.	Grotius' Introduction to Dutch Jurisprudence.
Groen. . . .	Groenewegen's footnotes to Grotius' Introduction to Dutch Jurisprudence.
Groen., De Leg.	Groenewegen's De Legibus Abrogatis.
H. C. . . .	Reports of the High Court of Griqualand West.
Hertzog . .	Reports of the High Court of the South African Republic for 1893. Translated by Leonard and Kotze.
Kotze . . .	Chief Justice Kotze's Reports of the High Court of the Transvaal Province from 1877 to 1881.
Lybrecht . .	Lybrecht's Redenerend Vertoog over't Notaris Ampt.
Menzies . .	Menzies' Reports of the Supreme Court.
Novel. . . .	Justinian's Novels.
Off. Rapp. . .	Official Reports of the High Court of the South African Republic, from 1894 to 1897. In the Dutch original.
Off. Rep. . .	Ditto. English Translation.
R. Obs. . .	Rechtsgeleerde Observatien.
Roscoe . . .	Roscoe's Reports of the Supreme Court.
S. Af. Rep. .	Reports of the High Court of the South African Republic. Vol. i., from 1881 to 1884, by Chief Justice Kotze; vol. ii., from 1885 to 1888, by Kotze and Barber.
S. C. . . .	Reports of the Supreme Court by Juta and others.
Schorer . .	Schorer's Notes to Grotius' Introduction to Dutch Jurisprudence, to be found in the Appendix to Maasdorp's Translation of that work.
Searle . . .	Searle's Reports of the Supreme Court.
T. S. . . .	Reports of the Supreme Court of the Transvaal.
V. D. K. . .	Van der Keessel's Selected Theses.
V. D. L. . .	Henry's Translation of Van der Linden's Institutes of the Laws of Holland.
V. L. . . .	Van Leeuwen's Roman Dutch Law, translated by Chief Justice Kotze.
V. L., C. F. .	Van Leeuwen's Censura Forensis.
Voet . . .	Voet's Commentarius ad Pandectas.
Watermeyer .	Watermeyer's Supreme Court Reports for 1857.

THE INSTITUTES OF CAPE LAW.

BOOK III.
THE LAW OF OBLIGATIONS.

PART II.—ACTIONABLE WRONGS.

CHAPTER I.

WRONGS IN GENERAL.

For the purposes of the legal rights dealt with in the earlier portions of this work it has been unnecessary hitherto to touch upon a very important class of rights of an elementary character, to which every person who happens to be in the country, whether he be a native of the country or a foreigner, a domiciled inhabitant or a mere wayfarer, is equally entitled. We refer to the right to inviolability of person and property, or, in other words, to immunity from wrongs to one's personal safety, freedom, and reputation,[1] and from damage to one's property or rights of ownership.

The infringement or violation of any of these rights is regarded as a wrong or "*injuria*"[2] in the eye of the law. With respect to the use of the word *injuria*, however, as equivalent to wrong, it must be observed

[1] G. 3 : 35 : 1.

[2] The term *injuria* in its more general sense was originally restricted to the wrongful act of a freeman. Damage caused by the act of a slave was called *noxa* and, if done by an animal, it was called *pauperies* (Voet, 9 : 1 : 1; Mack., § 483).

that under Roman law the word had two meanings, one a general and the other a specific one. In its general acceptation it was synonymous with the word "wrong," as here used, and signified anything done contrary to law (*non jure*).[3] In a more specific sense it was applied to any word or deed involving an insult (*contumelia*) to another[4] (or what we may call *injuria* proper), and which was intended to hurt his feelings or to injure him in his honour, dignity, or reputation.[5]

A wrong (*injuria*) in the general sense may be defined as an infringement or violation, without any legal justification or excuse, of any legal right of another person, whether such right be a right of property or any of the personal rights to which every person is entitled by the mere fact of his being a human being. The term will therefore exclude, in the first instance, all acts done in the exercise of a legal right,[6] such as in self-defence,[7] or even in preventing two persons who are engaged in a fight from killing one another,[8] or in protecting one's property from any extraordinary peril due to natural causes, such as the invasion of a swarm of locusts,[8a] as well as acts done with the consent of the person injured thereby, the maxim of our law being *volenti non fit injuria*.[9] In all these cases the damage caused is spoken of as *damnum absque injuria*.

The term "wrong" is also inapplicable to breaches of contract, which constitute a branch of law by themselves.

[3] Inst. 4: 4: pr.; Voet, 47: 10: 1; G. 3: 35: 1, 2; Vinnius, Inst. 4: 3: 2 and 4: 4: pr.; Decker's note (a) to V. L., vol. 2, p. 299.

[4] Inst. 4: 4: pr.

[5] Vinnius, Inst. 4: 4: pr.

[6] *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, 17 S. C. 95; *Pretorius* v. *Coetzee*, 1 S. A. R. 77; G. 3: 33: 7; Vinnius, Inst. 4: 3: 2, 8; Voet, 47: 10: 2.

[7] G. 3: 33: 9; Vinnius, Inst. 4: 3: 2.

[8] Schorer, Note 470.

[8a] *Greyvenstein* v. *Hattingh and others*, 25 S. C. 426.

[9] *Bennett* v. *Morris*, 10 S. C. 223; Schorer, Note 471.

In order to make a wrong actionable, it is essential that it shall have caused some damage, actual or implied in law, to some one. We say actual or implied in law, because there are some wrongs as to which damage will be presumed, even though none may have been actually proved, whilst in others damage will have to be proved if the plaintiff wishes to succeed. In the case of a wrong to the honour, dignity, or reputation of a person, for instance, damage will be presumed from the mere fact of the infliction of the wrong without any proof of special damage.[10] In the case of a wrong to property, on the other hand, damage (*damnum injuria datum*) must as a general rule be proved,[11] unless the wrongful act amounts to an *injuria* proper, that is, is accompanied with circumstances of insult (*contumelia*) to the owner of the property,[12] or is done in defiance of the rights of others.[13] Damage will also have to be proved where a wrong has been inflicted not intentionally but through negligence. Thus if a person inadvertently and innocently trespasses on the ground of another, he will not as a rule be liable, unless it be proved that he has caused actual damage there; but it would be otherwise if he does so in the assertion of a claim of right or in insolent defiance of the owner and in spite of prohibition by him,[14] such defiance amounting to an insult.

Where the wrong consists in the contravention of

[10] *Boonzaier* v. *Castens*, 1 Cape Times, 159; *Hart* v. *Robinson*, 12 E. D. C. 30; *Botha* v. *Pretoria Printing Works*, (1906) T. S. 713; *Fransman and another* v. *Kum*, 3 S. C. 198; *Majoor* v. *Van Tonder*, 3 Off. Rep. 101; *Pickard* v. *S. A. Trading Protection Society and others*, 22 S. C. 97; *O'Kelly* v. *Jamieson*, (1906) T. S. 822.

[11] *Hill and Padden* v. *Commissioner of Crown Lands*, 2 S. C. 398; Voet, 9: 2: 27.

[12] *Edwards* v. *Hyde*, (1903) T. S. 385.

[13] *Lord* v. *Gillwald*, (1907) E. D. C. 64.

[14] *Edwards* v. *Hyde*, (1903) T. S. 387; *Gosani* v. *Kreusch*, 25 S. C. 350; Voet, 47: 10: 7.

a public statute, the rule as to the necessity of proving damage will vary in different cases. Where a statute prohibits the doing of a particular act affecting the public, no person will have a right of action against another merely because he has done the prohibited act. It will be incumbent upon the party complaining in such a case to allege and prove that the doing of the act prohibited has caused him some special damage —some peculiar injury beyond that which he may be supposed to have sustained in common with the rest of his Majesty's subjects by the infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, it will not be necessary to allege or prove special damage.[15]

A wrong may be inflicted not only by intentional act or deed, but also through mere fault or negligence;[16] and in the former case the act need not necessarily be wholly illegal, seeing that it may be caused in the performance of an act legal in itself, but in the execution of which there has been excess or negligence.[17] Thus police officials are authorized to use a certain amount of force or violence in the execution of their duties, where such is absolutely necessary, and a schoolmaster to inflict a certain degree of punishment for the preservation of school discipline;[18] but if any of these, under cover of his powers, uses excessive violence, either in word or deed, without just cause, he will be liable.[19] So also a sheriff will be liable for abusing the powers of his office in the execution of judicial process, for instance, by

[15] *Patz* v. *Greene and Co.*, (1907) T. S. 433.
[16] Vinnius, Inst. 4 : 3 : 8.
[17] Voet, 47 : 10 : 2; Vinnius, Inst. 4 : 3 : 8.
[18] *Rocher* v. *Judge*, 1 Menzies, 376.
[19] Voet, 47 : 10 : 2.

unnecessarily attaching property, or by attaching property which is not liable to attachment, and such like.[20]

The same rules apply to the misuse of statutory powers, such as in the exercise of the right to kill dogs under certain circumstances,[21] and of a land-owner's right to impound stock trespassing on his ground.[22] In these cases, if the provisions of the statute are not strictly complied with, or if any unnecessary violence is used in any case, an action will lie.[23]

For damage done by mere accident no one will be liable,[24] unless he has voluntarily taken such liability upon himself by contract, or unless the case falls within the provisions of the Workmen's Compensation Acts.[25]

Under Roman law wrongs, in so far as they affected the rights of private individuals, were divided into those which arose out of delicts or criminal offences (*ex delictis*), and those which arose out of quasi-delicts (*quasi ex delictis*).[26] Of these two classes *delicta* were classified under four heads, namely, *furtum* (theft), *rapina* (robbery), *damnum injuria datum* (damage caused by an actionable wrong), and *injuria* (wrongs involving insult or *contumelia*),[27] and of these *furtum* and *rapina* had certain peculiarities which distinguished them from other wrongs. With us, however, all wrongs are either *damna injuria data* or *injuriæ* proper, theft and robbery not being distinguishable from other

[20] Voet, 47 : 10 : 2 and 7. See also p. 51, below.

[21] Act 15, 1892, sec. 26; *Duthie* v. *Benn*, 11 S. C. 38.

[22] Act 15, 1892, sec. 29.

[23] *Hall* v. *Municipality of Victoria West*, 3 S. C. 113; *Nass* v. *Cambridge Municipality*, (1906) E. D. C. 120; *Mason* v. *Dihning*, 20 S. C. 338; *Naudé* v. *Van der Walt*, 11 E. D. C. 77; Act 15, 1892, sec. 72; Ord. 16, 1847, sec. 9; *De Vos* v. *Coridon and Kriel*, 1 Searle, 121.

[24] Voet, 9 : 2 : 14; G. 3 : 34 : 4.

[25] Act 40, 1905; Act 41, 1906.

[26] G. 3 : 32 : 2.

[27] Voet, 44 : 7 : 6.

wrongs, except, perhaps, as regards the measure of damages to be awarded in connection with them.

Obligations arising out of quasi-delicts consisted under Roman law of the following four species—namely, (1) the obligation of a judge who through ignorance or carelessness gave an erroneous judgment, (2) that of a carrier by water, an innkeeper or stable-keeper, all of whom were liable for the delicts or crimes of their servants, and (3) that of the occupier of a house from which anything causing damage had been thrown or poured into a public thoroughfare along which people were accustomed to pass continually, or from which anything, having been hung out or placed upon the roof or some other projection, above or over a public thoroughfare, had fallen into such thoroughfare and caused damage there.[28] Of these the first, in so far as it makes a judge liable for an erroneous judgment given in good faith, but through ignorance or negligence, no longer obtains amongst us at the present day.[29] The second class may be regarded as arising more properly out of the contractual relationship subsisting between carriers, innkeepers, and stable-keepers, on the one hand, and persons making use of their ships, inns, or stables, on the other, and has accordingly been already treated of more appropriately under the heading of contracts.[30] The third is merely a special kind of liability attaching to damage caused by negligence, and will, therefore, be more appropriately dealt with further on under the heading of negligence. From all points of view, therefore, the Roman law classification of wrongs has

[28] Voet, 44: 7: 6; V. L., vol. 2, p. 322.

[29] *Cape of Good Hope Bank* v. *Fischer*, 4 S. C. 375; Voet, 5: 1: 58, *in fine*: Schorer, Note 482; V. D. K., Th. 808; Groen., De Leg., Inst. 4: 5: pr.

[30] Volume III., p. 260, *et seqq.*

to a great extent become obsolete, and is no longer of any practical use to us at the present day.

A more useful classification of wrongs is that which divides them, according to their motive cause, or mode of commission, into wrongs due to intentional acts and wrongs due to negligence merely, including under the term intentional acts not only acts in the ordinary sense, but also the spoken word and the written or printed page.[31] The former of these two classes may be further divided into *injuriæ* proper, that is, wrongs accompanied by insults or contumely, and those which are unaccompanied by such aggravating circumstances.

A further subordinate classification of wrongs is into wrongs to the person and wrongs to property,[32] but between these there is really no generic distinction, though they will be considered in their proper place according as occasion may require.

An intentional wrong may be either a crime or some other wrongful act, not amounting to a crime.

Where a wrong amounts to a crime its consequences are two-fold in character, that is to say, either *penal* or *compensatory*, as well under our law as under the Roman law.[33] The Roman law, however, differed from ours as regards the penal consequences of crime. Amongst the Romans crimes were prosecuted at the public instance, in the same way as with us, but in addition they had a further penal consequence which could be enforced by way of civil action instituted by the injured party against the wrongdoer, and which aimed at the recovery of a fine of double or quadruple the amount of the damage actually suffered, as a

[31] Voet, 47 : 10 : 7.
[32] Voet, 47 : 10 : 7; G. 3 : 33 : 1.
[33] G. 3 : 32 : 7; V. L., vol. 2, p. 253.

private penalty for the crime committed against the individual.[34] This two-fold punishment of the criminal has, however, never obtained under our law,[35] the criminal responsibility of a wrong-doer being limited to his liability for the wrong done to the State, whether the prosecution be public or private, and the only remedy of the injured party being by way of civil action for compensation in damages for the injury done to him.[36] The object of this civil action is to recover compensation for any loss or damage of which the wrongful act is the proximate cause, but not for damage which is too remote.[37]

With respect to wrongful acts amounting to crimes, it may be premised that there is no rule of our law which requires the injured party to prosecute the wrongdoer before suing for compensation,[38] although, as already shown,[39] he will not be allowed to enter into any agreement with the latter which will amount to the compounding of a crime.[40]

Even minors will be civilly liable for wrongs committed by them, provided that they are of an age which makes them criminally responsible;[41] and the same is the case with respect to persons of unsound mind.[42] A minor, for instance, has been held liable for seduction.[43]

As a general rule, no one will be civilly liable for any wrongful act, except he who has committed it or

[34] *Van Noorden* v. *Wiese*, 2 S. C. 48; Voet, 47 : 2 : 15; V. L., C. F., part 1 : 5 : 1 : 2.

[35] *Van Noorden* v. *Wiese*, 2 S. C. 48; Voet, 47 : 2 : 15.

[36] Voet, 9 : 2 : 6; V. L., vol. 2, p. 253, 254; V. L., C. F., part 1 : 5 : 1 : 2.

[37] Voet, 9 : 2 : 6; *Ngai and Assegai* v. *Nyobozana*, 14 E. D. C. 155.

[38] *Schoeman* v. *Goosen*, 3 E. D. C. 7.

[39] Volume III., p. 19.

[40] *Schoeman* v. *Goosen*, 3 E. D. C. 7; *Williams* v. *Young*, Kotze, 134; Ord. 40, 1828, sec. 12; Voet, 47 : 2 : 20.

[41] G. 3 : 32 : 19; Vinnius, Inst. 4 : 3 : 2.

[42] Vinnius, Inst. 4 : 3 : 2.

[43] *Ex parte*, Greeve, 24 S. C. 202.

who has instigated, aided, or abetted the commission of the same.[44] There is one exception to this rule, however, in the case of the occupiers of houses who, by special enactment under Roman law, were declared liable for damage caused to passers-by by anything thrown or poured or falling from their houses into any thoroughfare; but this subject will be more properly treated of under the heading of negligence.

No one is as a rule liable for not preventing a wrongful act from being done by another or for not prohibiting its commission, but he will be so liable if, being in a position of authority and control over another and able to prevent him from doing a wrongful act, he allows such act to be done by him (*qui non prohibit quod prohibere potest, assentire videtur*).[45]

No one is responsible for damage caused by the wrongful acts of his children or servants,[46] except in so far as such damage has resulted from some act done by the latter in the execution of, and within the scope of, some business entrusted to them by him;[47] but, where this has been the case, he will be liable.[48] Consequently, where a shepherd, acting for the benefit of his master, and in the ordinary course of his employment, had set fire to the grass on his master's farm, but had done so negligently, with the result that the fire spread and consumed trees and other vegetation on a neighbour's land, the master was held liable for the damage done.[49]

[44] *Ferguson* v. *Pretorius and others*, Kotze, 157; Voet, 47: 10: 3; 9: 2: 14, 25; G. 3: 32: 12; 3: 33: 4; V. L., C. F., part 1: 5: 1: 6 *et seqq.*

[45] *Philpott* v. *Whittal and others*, (1907) E. D. C. 207.

[46] *April* v. *Pretorius*, (1906) T. S. 824; G. 3: 38: 8; Schorer, Note 485.

[47] *Parkin* v. *Reed*, 21 S. C. 503; *Nconti* v. *Nolenti and another*, 19 S. C. 417; Voet, 9: 4: 10; Schorer, Note 274.

[48] *Marona* v. *Blackbeard*, 21 S. C. 436.

[49] *Lotter* v. *Rhodes*, 19 S. C. 122.

There are three classes of persons also who are liable for damage due to the crimes or other wrongful acts of their servants, whether committed within the scope of their employment or not. These are carriers, inn-keepers, and stable-keepers, upon whom an absolute duty is cast to make good all loss or damage to property brought into their ships, inns, or stables, even though such loss or damage may have been due to theft committed by their servants or others, or to any other cause, provided it has not been caused by the act of God or *vis major*, such as shipwreck or capture by pirates, or by forcible breaking into an inn or stable and stealing therefrom the goods or horses of travellers. As, however, the special liability of these excepted classes arises out of the contractual relationship subsisting between them and persons making use of their ships, vehicles, inns, or stables, it has, it is submitted, been more appropriately dealt with under the heading of contracts.[50]

By the law of England an exception to the general rule, as to the liability of a master for damage caused by his servants within the scope of their employment, has been adopted in the case of damage caused by a servant to a fellow-servant in the course of a common employment. The reason given for this exception is that every person engaging in any service attended with danger must be regarded as having taken upon himself the risk of all perils incidental to the service he has undertaken, and to the carelessness of fellow-servants employed upon the same work.[51] There has

[50] Volume III., p. 260 *et seqq.*

[51] *Priestley* v. *Fowler*, 3 M. & W. 1; *Hutchinson* v. *York, Newcastle and Berwick Railway Co.*, L. J., 19 Ex., N. S. 296; *Wigmore* v. *Jay*, 5 Ex. 354; *Reid* v. *Bartonshill Coal Co.*, 3 Macqueen, 266; *McGuire* v. *Bartonshill Coal Co.*, 3 Macqueen, 300; *Wilson* v. *Merry*, L. R., 1 H. L., Sc. 327; *Hilpert* v. *Castle Mail Packets Co.*, 12 E. D. C. 45.

been some difference of opinion in South African courts as to whether this principle is recognized by our Roman-Dutch law. It was adopted for the first time to its fullest extent by a majority of the judges of the Eastern District Court in 1887, in the case of *Hilpert* v. *The Castle Mail Packets Co.*;[52] but was repudiated by the High Court of the late South African Republic in the case of *Lewis* v. *South African Gold Mining Co.*, and *Eagleson* v. *The Argus Printing and Publishing Co.*,[53] and this latter ruling has been adopted by the Supreme Court of the Transvaal in *Waring and Gillow, Ld.* v. *Sherborne*, and *Parke* v. *No.* 1 *Tin Syndicate*.[54] In *Eyssen* v. *Calder and Co.*,[55] Sir Henry de Villiers said it was unnecessary to decide the question as to whether the English doctrine held good in our law, but added: "That doctrine appears to be founded on the supposition that a servant on taking service contracts that, as between himself and his master, he will run the risk of any injury that might be done to him through the negligence of his fellow-servants engaged with him in a common employment. I am not prepared to say that this Court would import any such term into a contract of service without clear proof that the parties themselves had agreed to it." He would therefore appear to hold the negative view, and the weight of judicial authority may consequently be taken to be opposed to the doctrine of the English law. An employer may, however, by express contract with his employees, limit his liability for damages caused by the negligence of fellow-employees, such agreement not being opposed to public policy; but

[52] 12 E. D. C. 38. See also *Thomas* v. *Doig*, 12 E. D. C. 23.

[53] 1 Off. Rep. 1 and 259.

[54] (1904) T. S. 340, and (1906) T. S. 582.

[55] 20 S. C. 437.

whether he can do so as regards damage caused by his own wilful act, default, or negligence is doubtful.[56]

The rule laid down above, as regards the liability of employers for wrongs done by their servants within the scope of their employment, applies also generally as between principal and agent, a principal being, as already shown,[57] liable for the wrongful acts or negligence of his agent in all matters falling within the scope of the authority given by the former to the latter.[58] This rule, however, does not apply to the Crown and its servants, the legal relationship subsisting between whom depends to a great extent upon the law of England, according to which the Crown cannot, in contemplation of law, command a wrongful act to be done, and therefore cannot be held liable for the wrongful acts or negligence of its servants.[59]

Where a wrongful act has been done by an agent within the scope of his authority, both the principal and the agent will be equally liable to make compensation for any damage caused by the same,[60] unless indeed a mandate has been given to do something apparently innocent in itself, and not necessarily either wrongful or a crime, and the agent carries it out in ignorance of the fact that it is wrongful, in which case

[56] *Morrison v. Angelo Deep Gold Mines*, (1905) T. S. 775.

[57] Volume III., p. 303.

[58] *Gifford* v. *Table Bay Dock and Breakwater Commission*, 4 Buch. 96; *Binda* v. *Colonial Government*, 5 S. C. 289; *Parker* v. *East London Municipality*, 18 S. A. L., p. 52; *Lewis* v. *Salisbury G. M. Co.*, 1 Off. Rep. 1; *Eagleson* v. *Argus Printing and Publishing Co.*, 1 Off. Rep. 259; *Waring and Gillow, Ld.* v. *Sherborne*, (1904) T. S. 340; *Parker* v. *No. 1 Tin Syndicate*, (1906) T. S. 582; Voet, 14 : 3 : 4; 9 : 4 : 10; Schorer, Note 274. But see *Priestly* v. *Dumeyer*, 15 S. C. 393; G. 3 : 1 : 34; 3 : 38 : 8; V. D. K., Th. 477.

[59] *Binda* v. *Colonial Government*, 5 S. C. 284; *Merricks* v. *Transvaal Government*, (1906) T. S. 229.

[60] *Marona* v. *Blackbeard*, 21 S. C. 437; *Thompson* v. *Barkly East Rinderpest Committee*, 14 S. C. 393; Voet, 47 : 10 : 3; 17 : 1 : 6.

only the principal will be liable. Thus where labourers have been hired to work upon certain land in collecting fruit, cutting down trees, or such like, and they do so in ignorance of the fact that the land belongs to a third party and not to their employer, they will not be liable. It would be otherwise if they have received due warning from the real owner of the ground that they are engaged upon an unlawful business.[61]

No person will be liable for the wrongful acts of a competent and independent contractor employed by him under instructions from the proper public authorities, and over whom he has no control, where such contractor is obliged to do the work under the supervision and to the satisfaction of the engineer of those authorities.[62] In such a case the contractor will be the proper party to be sued.[63] It does not follow, however, that, because the agent is liable in such a case, the principal will always be exempt from liability. Where, for instance, the contractor is employed to perform certain work under certain circumstances which, without due precautions, may reasonably be anticipated to be a source of danger to others, and damage does ensue to any one, the principal, though not liable for the acts of the independent contractor, will be liable for his own negligence in not providing the necessary precautions.[64]

Where damage has been caused by several joint wrong-doers, each will be liable *in solidum*, but upon one paying the others will be absolved.[65] In accordance

[61] Voet, 17 : 1 : 6.

[62] *Kotze* v. *Ohlsson's Breweries*, 9 S. C. 319.

[63] *Atkins* v. *Camps Bay Tramway Co.*, 18 S. C. 245.

[64] *Newman* v. *East London Town Council*, 12 S. C. 72.

[65] *Paterson* v. *McLoughlin and Solomon & Co.*, 6 Buch. 63; *Steenkamp* v. *Kyd*, 15 S. C. 221; *Bessenger* v. *Dyan, Umhale & Nosequ*, 6 E. D. C. 42; *Dreyer* v. *Van der Walt*, 15 E. D. C. 58; *Pieta* v. *Mhlom*, 12 E. D. C. 97; *Van der*

with this rule it has been decided that where two dogs, one of which belonged to the defendant, acting in concert, had killed some sheep belonging to the plaintiff, the defendant was held liable *in solidum* for the whole of the damage,[66] at any rate where it was impossible to ascertain how much damage had been done by each dog.[67]

On the same principle where there are two separate causes contributing to one and the same injury, the authors of both will be liable.[68]

But where one person has mortally wounded an animal belonging to another, and a third party afterwards kills it after an interval, both wrong-doers will be liable for the death of the animal, provided it can be proved that the animal would in any event have died of the first wound. On the other hand, if the animal would not have died of the first wound, the first wrong-doer will be liable for wounding the animal only, and not also for the killing of it.[69]

Where one joint wrong-doer has paid the whole of the damage, he will have no recourse against his fellow wrong-doers for their shares.[70]

The action for compensation will lie at suit of any person who has suffered any damage or injury from a wrongful act. Where, for instance, injury has been done to property, not only the owner of such property, but also everyone who has any material interest in such property or in its continuing uninjured, such as a usufructuary, usuary, pledgee, or lessee, will

Westhuysen v. *Smith and others*, (1905) T. S. 108; Voet, 9 : 2 : 12; 13 : 1 : 5; 4 : 3 : 9; G : 3 : 32 : 12, 15; 3 : 34 : 6.

[66] *Graan* v. *During*, 2 S. C. 308.

[67] *Nel* v. *Halse*, 6 S. C. 275.

[68] *Newman* v. *East London Town Council*, 12 S. C. 74; *Hunter* v. *Cape Town Tramways Co.*, 17 S. C. 81; *Metropolitan Tramways Co.* v. *Cape Town Town Council and Cape Town Gas Co.*, 23 S. C. 407.

[69] Voet, 9 : 2 : 9.

[70] Voet, 9 : 2 : 20, *in fine*.

be entitled to sue for the damage done to his particular interest in the property.[71]

Again, in the case of injury to the person, not only the person himself who has suffered actual bodily injury, but, in case he should succumb to the same, also his wife and children, whether legitimate or illegitimate, or any other person who has a legal claim to maintenance against the injured person, or who has suffered any other loss through the death of such person, will have an action of damages for the loss sustained by any of them by reason of such death, at any rate to the extent of the loss suffered by each.[72]

According to Voet, an action will even lie for injuries done to a deceased person, as where his corpse is wrongfully detained, or his funeral interrupted, or his grave desecrated, or where a libel is published of the deceased after his death, such action to be instituted by the executor, or children, or heirs of the deceased. In the case of a posthumous libel, the children will be entitled to sue for the injury done to themselves through such libel.[73]

An injury may be done to one even through others, as where an injury is inflicted upon one's servants or minor children or wife, as an insult to one's self,[74] or where a physical injury is caused to a servant or child which results in damage to the master or parent through the loss of the services of such servant or child.[75]

In most cases the object of the action based on

[71] *Bower* v. *Divisional Council of Albany*, 7 E. D. C. 211; Voet, 9 : 2 : 10; 9 : 1 : 7.

[72] *Elmer* v. *Warren*, 5 E. D. C. 385; *Clingen* v. *Ross*, 16 S. C. 152; Voet, 9 : 2 : 11; 10 : 2 : 7; G. 3 : 32 : 16; V. L., vol. 2, p. 282; V. D. L., p. 289; Voet's Beginselen des Rechts, 4 : 3 : 3.

[73] Voet, 47 : 10 : 5; G. 3 : 35 : 4.

[74] Voet, 47 : 10 : 6; G. 3 : 35 : 6.

[75] G. 3 : 34 : 3.

wrong is merely to obtain compensation for the loss or damage actually sustained.[76] There are some cases, however, as shown above,[77] in which damage will be presumed, without being actually proved, namely, those in which the wrong inflicted is accompanied with circumstances of insult (*contumelia*) or reckless defiance of the rights of others.

The amount of damages to be awarded in each case is a question of fact to be decided by the Court sitting as a jury, and taking into consideration the circumstances of each case; but the Court will be guided by different principles in these two classes of cases. Where, for instance, circumstances of insult and of aggravation are absent, it will make no difference as regards the amount of damages whether the damage was due to a wilful and deliberate act or merely to negligence or want of skill.[78] In cases, however, in which a wrong is accompanied with circumstances of insult, and a desire to hurt the feelings of the plaintiff and to injure him in his honour, dignity, or reputation, the law breathes a spirit of revenge and of punishment, and in these the Court will sometimes grant vindictive damages,[79] and will even grant exemplary damages where a defendant has been guilty of a wilful disregard of the rights of others, causing injury either to person or to property.[80]

In the absence of circumstances of aggravation the Court will, in the case of injury to the person, have to take into consideration the medical expenses to which the plaintiff has been put, and the loss suffered by him

[76] Voet, 9 : 1 : 8; 21 : 1 : 12.
[77] Notes 12 and 13 above.
[78] Voet, 9 : 2 : 13.
[79] Voet, 47 : 10 : 13; *Hill* v. *Wallace*, 1 Menzies, 347.
[80] *Morkel* v. *Netherlands South African Railway Co.*, 3 Off. Rep. 71; *Waring & Gillow, Ld.* v. *Sherborne*, (1904) T. S. 348.

through the fact of having been incapacitated from work partially or wholly, temporarily or permanently.[81] The plaintiff will also be entitled to compensation for the pain and suffering he may have endured, and for any permanent disfigurement he may have suffered.[82] For mental suffering unaccompanied by physical injury or illness no allowance will as a rule be made, except in the case of injuries of an insulting nature, which are specially calculated to hurt the feelings and which are expressly inflicted with that object in view.[83] No damages will consequently be given for mental suffering occasioned through negligence.[84]

In the case of an action brought by a wife or children for damage due to the death of a husband or father, the measure of damages will be the maintenance or any other benefits derived by them from the deceased and lost to them through his death;[85] and when there are several claimants, one is not preferred to another, but all will be entitled to claim concurrently for the loss suffered by each.[86] No damages will be allowed in such a case for the mental suffering or shock sustained by wife or child upon receiving the news of the death.[87]

In the case of the destruction or loss of or damage to property the measure of damages will as a general rule be the actual pecuniary loss sustained.[88]

[81] G. 3 : 34 : 2; V. L., vol. 2, p. 293; V. D. L., p. 257.

[82] *Hume* v. *Divisional Council of Cradock*, 1 E. D. C. 117, 134; *Clair* v. *Port Elizabeth Harbour Board*, 5 E. D. C. 315; *Murtha* v. *Von Beek*, 1 Buch. App. C. 126; Voet, 9 : 3 : 4; 9 : 1 : 8; Groen., De Leg., Inst. 4 : 5 : 1; G. 3 : 34 : 2; R. Obs., part 3, obs. 96.

[83] G. : 3 : 32 : 20.

[84] *Waring & Gillow, Ld.* v. *Sherborne*, (1904) T. S. 348.

[85] Voet, 9 : 3 : 4; Groen., De Leg., Inst. 4 : 5 : 1; G. 3 : 32 : 16; 3 : 33 : 2.

[86] Schorer, Note 467.

[87] *Waring & Gillow, Ld.* v. *Sherborne*, (1904) T. S. 348.

[88] *Murtha* v. *Von Beek*, 1 Buch. App. C. 126; *Victoria Diamond Mining Co.* v. *De Beer's Mining Co.*, 1 Buch. App. C. 306; *Hall* v. *Compagnie Française*, 1 H. C. 464; Voet, 9 : 2 : 16; 12 : 3 : 1; G. 3 : 32 : 18.

Where a defendant fraudulently or through gross negligence failed or contumaciously refused to restore property which he was legally bound to restore, the plaintiff was under Roman law allowed to recover more than the real value of such property, in consideration of any special affection he might be prepared to swear that he had for the same, it being considered unjust that the owner should maliciously and against his wish be deprived of his property; but this rule did not apply to ordinary negligence.[89] By our law the whole question of damages is left to the discretion of the Court, to be decided according to what is fair and reasonable under all the circumstances;[90] but where damage has been caused by a deliberate wrong, the Court will not scrutinize too carefully the evidence as to the amount of damage.[91]

The right of action based upon wrongs becomes extinguished, like all other obligations, by prescription, which in this case begins to run from the time that the injured party becomes aware of the wrong which has been done to him.[92] The period of prescription in the case of ordinary wrongs is thirty years,[93] but in the case of injuries accompanied with circumstances of insult or contumely, such as slander or libel, the action will be prescribed unless brought within one year.[94] The action for an apology, however, which used formerly to be customary in the case of defamation, was prescribed only in thirty years.[95]

[89] Voet, 12 : 3 : 2, 4, 6.

[90] Voet, 12 : 3 : 8.

[91] *Stuurman* v. *Van Rooyen*, 10 S. C. 37. But see G. 3 : 33 : 5.

[92] Voet, 47 : 10 : 21.

[93] Voet, 47 : 10 : 17, 21. See also Voet's Beginselen des Rechts, 4 : 4 : 8; V. L., vol. 2, p. 301.

[94] *Reid* v. *Van der Walt*, 2 Searle, 285; *Beukes* v. *Coetzee and Joubert*, 1 S. A. R. 71; Voet, 47 : 10 : 17, 21 and 44 : 3 : 7; G. 3 : 35 : 3 and Groenewegen's footnote 6 thereon, and G. 3 : 36 : 4; Schorer, Note 480, last paragraph; V. L., vol. 2, p. 301; Voet's Beginselen des Rechts, 4 : 4 : 9.

[95] Voet, 47 : 10 : 17.

Under Roman law the right of action was extinguished also by the death of the wrong-doer, and could not be enforced against his heirs, unless, indeed, the action had been commenced against the wrong-doer in his lifetime, and had been carried to the stage of *litis contestatio* or joinder of issue before his death, or unless any benefit had accrued to the heirs from the wrongful act.[96] This rule was an exception to the general rule of that law, according to which, as already pointed out,[97] an heir who had adiated without benefit of inventory, became liable for the payment or fulfilment of all the debts and obligations of the deceased, and this exception was based upon the ground that actions based on wrongs were of a penal character and personal to the wrong-doer himself, and ought, therefore, not to pass against his heirs.[98] Under our modern law, however, except perhaps in the case of *injuriæ* proper, that is to say, of wrongs accompanied by circumstances of insult or contumely, as in the case of slander and libel,[99] the action is no longer of a penal nature, but merely aims at compensating the injured party for the damage actually done to him.[100] The reason for the exception, therefore, no longer obtains amongst us, and the exception itself may be regarded as obsolete.

In addition to this, as already pointed out,[101] the general rule of the Roman law has itself ceased to exist in consequence of the alteration in the position of the heir brought about by our statute law. Under our law, the place of the heir of the Roman law who

[96] D. 47 : 1 : 1; 50 : 17 : 38, 111, 127, 164; 44 : 7 : 33; C. 4 : 17.
[97] Vol. I., p. 145.
[98] Schorer, Note 464.
[99] Voet's Beginselen des Rechts, 4 : 4 : 9. See also Voet, 3 : 6 : 2 and 3.
[100] Voet's Beginselen des Rechts, 4 : 3 : 10.
[101] Vol. i., p. 146.

had adiated with benefit of inventory is occupied by the executor of the estate of the deceased, who can only be sued upon the debts and obligations of the deceased to the extent of the capacity of the estate. There is nothing, therefore, to prevent the executor of a wrong-doer from being sued for compensation for any damage caused to another by any wrongful act of the deceased, even though no action may have been commenced nor the stage of *litis contestatio* reached in his lifetime, and even though the estate of the wrong-doer may have derived no benefit from the wrongful act,[102] provided the estate or patrimony of the injured party has suffered damage from the wrong.[103] No action, therefore, which aims at compensation merely, will lie at suit of the executor of the injured party, unless some wrong has been done to the latter by which his estate has been prejudiced or suffered some appreciable pecuniary loss.[104] Thus, whilst the executor will not be entitled to recover damages for the pain and disfigurement and other personal injuries suffered by the deceased from some wrongful act or negligence which caused his death, there will be nothing to prevent his suing for the refund of the medical, funeral, and other expenses incurred by the deceased or his estate in consequence of the wrong done to him.[105]

Where an action is brought not in order to obtain compensation for actual damage sustained, but in a spirit of revenge and in order to punish the defendant by way of general damages, the rule of the Roman law still obtains amongst us.[106] Thus, in the case of wrongs

[102] Voet, 9 : 2 : 12; 47 : 1 : 3.
[103] Voet, 48 : 5 : 5; G. 3 : 32 : 10; 3 : 35 : 4.
[104] Voet, 48 : 5 : 5; 27 : 7 : 6; 3 : 6 : 2 *in fine*.
[105] G. 3 : 33 : 2; V. L., vol. 2, p. 282.
[106] Voet, 3 : 6 : 2, *in fine*.

inflicted with circumstances of insult and contumely, and with the object of hurting the feelings rather than the patrimony or estate of the injured party, as is the case with libel or slander, no action can be maintained after the death of either the wrong-doer or the injured party, unless such action was commenced during the lifetime of the deceased party and had been carried to the stage of *litis contestatio* before his death.[107]

CHAPTER II.

INJURY TO THE PERSON.

WRONGS of violence to the person are twofold in their nature, that is to say, they may be such as merely inflict bodily pain or injury, in which case they are *damnum injuriâ datum*, or they may be such as are accompanied by circumstances of insult or contumely, in which case they fall under the heading of *injuria* proper. Under the later Roman law the remedy for the latter wrong was the *actio injuriarum*,[1] and for the former an equitable action under the *lex Aquilia*.[2] All cases of assault or intentional violence to the person fell under the class of *injuriæ*[3] proper, whilst personal injury arising out of negligence or any other unintentional violence were included under *damna injuriâ data*.[4]

With us all these distinctions as to forms of action

[107] *Executors of Mezer* v. *Gericke*, Foord 14; *Pienaar & Marais* v. *Pretoria Printing Works*, (1906) T. S. 654; G. 3 : 32 : 10; 3 : 35 : 4; Voet, 3 : 6 : 2, *in fine*.

[1] Voet, 47 : 10 : 13.
[2] Voet, 9 : 2 : 11.
[3] Voet, 47 : 10 : 13.
[4] Voet, 9 : 2 : 11.

have become obsolete, the difference between the two forms of wrong being merely of importance with reference to the measure of damage to be applied in each case.

Wrongs of violence to the person with us fortunately occur most frequently through negligence or through some wrongful but unintentional act, which will be considered more appropriately further on under the heading of negligence.[5] In so far as violence is intended as an insult merely, it belongs to the class of wrongs to the honour, dignity, or reputation, which we shall treat of further on.[6] Most cases of intentional violence to the person, however, consist of a combination of insult and of physical hurt or injury to the person, and it will therefore be considered separately here.

The generic name for intentional acts of violence to the person is *assault*, which may be committed not only by actually striking a person, but also by merely threatening him with the fist or otherwise putting him in bodily fear, as also by throwing filth or anything else at him, and even by drugging him with wine or anything else in order to expose him to ridicule.[7] The violence must, however, be both intentional and wrongful. Consequently there will be no assault if one person strikes another in joke without inflicting any bodily pain or injury upon him, for in that there will be no intention of insult (*injuria*) nor actual damage (*damnum*).[8] Nor will an action lie where two persons strike each other in an ordinary sparring match, even though they may inflict bodily injury upon each other, there being no wrongful act (*injuria*)

[5] See Chapters IV. and V., below.
[6] See Chapter VIII., below.
[7] Voet, 47 : 10 : 7.
[8] Voet, 5 : 1 : 2.

present in such a case, inasmuch as both combatants are consenting parties to the infliction of such injuries, provided these be inflicted in accordance with the rules of the science, the maxim of our law being *volenti non fit injuria*.[9] Acts done in self-defence, again, will be lawful, provided they do not exceed the immediate requirements of such self-defence, and consequently no action will lie for injuries caused by the same.[10] Provocation, again, will have the effect of either negativing the right of action altogether, or at any rate of reducing the amount of damages. Thus, if one man calls another a liar, he will have to stand the natural consequences, and will have only himself to thank if he finds himself knocked down.[11]

Some persons are exempted from responsibility for personal violence, provided they do not exceed the limits of moderation prescribed by law. Thus parents are entitled to inflict moderate chastisement for purposes of discipline and correction on their children, provided they are not guilty of unnecessary violence or excess.[12] Schoolmasters also and master tradesmen or other employers of apprentices are entitled to inflict moderate punishment on their pupils or apprentices, but will be liable if they exceed the limits of moderation.[13] As regards schoolmasters especially, it has been well said that their position in attempting to maintain discipline in their schools is at all times difficult and trying, and Courts of law will not, therefore, lightly interfere with their discretion in the infliction of punishment on their pupils, nor weigh too nicely the degree of punishment which is appropriate in any particular case, nor presume

[9] *Ibid.*

[10] Voet, 9 : 2 : 22, 28; Voet's Beginselen des Rechts, 4 : 3 : 6.

[11] *Saget* v. *Bataillow*, 1 Buch. 33.

[12] Voet, 5 : 1 : 2.

[13] Voet, 9 : 2 : 15; 47 : 10 : 2 and 20.

too readily that punishment was dictated by improper motives.[14] Upon the same principle it has been held that a schoolmaster will not be liable to an *actio injuriarum* for expelling a boy from school upon a reasonable belief of misconduct and without malice.[15]

Magistrates and police officials also are sometimes obliged, and are entitled in law, to exercise some violence in the performance of their duties, provided they do not exceed the necessities of the case or the limits of due moderation.[16]

The action will, as a general rule, lie at suit of the injured party against the wrong-doer; but there are some cases in which some one other than the party directly injured may be entitled to an action, the latter, however, still retaining his rights of action. Thus where a minor child has been wounded, the father will be entitled to recover the medical and other expenses necessitated by the injury, and, in addition, to compensation in damages for loss of services, if any, and to funeral and other expenses in case the child should succumb to such injury,[17] the child himself, however, in the former case retaining his own right of action for compensation in damages for the suffering he has undergone, the disfigurement he has suffered, and other injuries as laid down above.[18]

By our modern customs a right of action is allowed to the wife and children also, whenever a husband or father has been killed, the damages being measured according to the maintenance and other benefits which they were legally entitled to expect from the deceased. Hence, if a wife, parents, and children concur in

[14] *Queen* v. *Soga Mgikela*, 10 S. C. 242; Voet, 47 : 10 : 2.

[15] *Rocher* v. *Judge*, 1 Menzies, 376.

[16] Voet, 9 : 2 : 15; 47 : 10 : 2 and 20.

[17] Voet, 9 : 2 : 11.

[18] See p. 17, above.

making claims, one is not preferred to the other, but each will be entitled to recover compensation for his own interest in the matter, the action being allowed to them not as being heirs to the deceased, but as having suffered actual loss by his death.[19]

A husband will not be entitled to any right of action simply on the ground that his wife's death has been caused by the wrongful act or negligence of another, unless he can prove that he has suffered some special pecuniary loss by reason or in consequence of her death.[20]

Where any wounds or other bodily injuries have been inflicted through any wrongful act, an action for compensation in damages will lie against the wrongdoer, the measure of damages being the medical expenses incurred by the wounded man, and any loss sustained by him through his having been incapacitated, either wholly or partially, from attending to his ordinary business, either temporarily or permanently, as also for the pain suffered by him and for any disfigurement resulting from the injury.[21] It is not, however, essential that there shall have been any bodily injury, provided that the violence to the person was intentional and unprovoked. In the case of a deliberate assault, for instance, the law requires the award of damages for the insult (*contumelia*), even though there may have been no actual bodily injury. Thus, when one man slaps another in the face, there may be no great pain inflicted and no doctor's bill incurred; but the insult offered to the man attacked

[19] Voet, 9 : 2 : 11; V. D. L., p. 249; Voet's Beginselen des Rechts, 4 : 3 : 3.

[20] *Steenkamp* v. *Juriaanse*, (1907) T. S. 985.

[21] Voet, 9 : 2 : 11; V. L., vol. 2, p. 293; V. L., C. F., part 1 : 5 : 21 : 16; Voet's Beginselen des Rechts, 4 : 3 : 11. See also p. 16, above.

and the reckless disregard of his legal right to the inviolability of his person, are wrongs for which the Courts are justified in granting substantial damages.[22]

The amount of damages will vary according to the circumstances of each case, the measure of damages being regulated according to the rank, position, and means of the parties, the time, and the publicity or otherwise of the place of the commission of the wrong, the severity of the injury, and the grossness of the insult involved.[23]

The action for personal violence becomes prescribed in thirty years.[24]

CHAPTER III.

WRONGS TO OWNERSHIP.

Rights of ownership, as pointed out in an earlier part of this work,[1] consist in the exclusive right of an owner to dispose of and deal with his own property, which includes the right to the inviolability or security of such property from interference by others, and in the right to the exclusive use and enjoyment of such property. Wrongs to ownership, on the other hand, consist in the violation of any of these rights, whether the property in any particular case be movable or immovable.[2] We shall begin with wrongs to movable property.

Wrongs to movable property, then, may be inflicted either by depriving the owner of his rights of

[22] *Majoor* v. *Van Tonder*, 3 Off. Rep. 101; *Botha* v. *Pretoria Printing Works*, (1906) T. S. 713; *O'Kelly* v. *Jamieson*, *Ibid.* 822.

[23] Voet, 47 : 10 : 13; *Hill* v. *Wallace*, 1 Menzies, 347.

[24] Groenewegen's footnote 6 to G. 3 : 35 : 3; V. L., vol. 2, p. 301.

[1] See Book II., chap. xii.

[2] V. L., vol. 2, p. 313.

ownership altogether, that is to say, by the wrongful conversion of such property without any legal right or title, or by a partial deprivation of such rights, such as by damaging the property without depriving the owner of the same, or by depriving him of the possession or enjoyment of the property only. Any of these wrongs will entitle the owner to a right of action for compensation as regards the particular right which has been violated, whether such violation consists in the theft or other illegal conversion of the property, or in damage to the property or in the illegal use, enjoyment, or possession of the same.

The plaintiff in an action based on wrongful conversion is bound to show that he is the owner of the property stolen or otherwise converted, or has some interest therein for the loss of which he is entitled to be compensated; for the action will lie not only at suit of the full owner, but also at that of any person who has a limited right to the property, of such a nature that to be deprived thereof will be an appreciable loss to him, as is the case with a pledgee, lessee or borrower for use.[3] A purchaser of property, who has not yet received delivery of the same, not being as yet the owner, cannot sue for compensation for the loss of such property, nor for any damage done to the same, unless he has first obtained cession of action from the seller.[4]

The plaintiff must further prove that there has been an actual wrongful conversion by the defendant.[5]

Illegal conversion takes place most frequently by way of theft, that is to say, by the wrongful taking of

[3] Voet, 47 : 2 : 15; G. 3 : 37 : 5; Vinnius, Inst. 4 : 1 : 13–17; Voet's Beginselen des Rechts, 4 : 1 : 23 and 4 : 3 : 7.

[4] *Grobbelaar* v. *Van Heerden*, (1906) E. D. C. 229; Voet's Beginselen des Rechts, 4 : 1 : 23.

[5] *Myburgh* v. *Nayler*, 3 S. C. 228.

movable property without the consent of the owner, and with the intention of appropriating the same to one's own use without any colour of right.[6] But it may also take place by other modes of conversion not amounting to actual theft, as is the case with a depositary or pledgee who, in breach of his legal rights, makes use of the property deposited with him, or with a *commodatarius* or borrower for use, who converts the thing lent to him to uses other than that for which it was lent.[7]

The usual practice in a case of wrongful conversion is to sue for the return of the property or its value, and judgment may then be given for the return of the property within a certain time or, in default, for payment of its value. If in such a case the defendant fails to return the property within the time specified in the judgment, he will lose his option of doing so, and will then be obliged to pay the value placed upon the property by the Court.[8]

The object of the action is in the first place to recover the article itself which has been illegally converted, even though it may have been changed in character by *specificatio*, together with all fruits or increase, and in addition damages for the loss of the use of the same in the meanwhile.[9] Where the thief is unable to restore the thing owing to its having been destroyed or otherwise lost, he may be compelled by action (*condictio furtiva*) to pay to the owner by way of compensation in damages the highest value which the thing may have had since the date of the theft,

[6] *Queen* v. *Swart*, 12 S. C. 422.
[7] Voet, 47 : 2 : 15.
[8] *Jamieson* v. *Rhind*, 4 E. D. C. 316.
[9] *Colonial Secretary* v. *Breda's Curator and others*, 7 Buch. 13; Voet, 13 : 1 : 3 and 6; 13 : 3 : 3; 47 : 2 : 10; Groen., De Leg., D. 13 : 1 : 1; Vinnius, Inst., 4 : 3 : 9, 10; V. D. L. p. 252. See also vol. ii., p. 86, above.

a thief being regarded as *in mora* during every moment of the time that he is in possession of the stolen thing, and therefore also at the time when it was at its highest value.[10] If any question should arise as to the value of the property stolen, there will in addition be a presumption against the thief, but not also against his executor, nor against the trustee of his insolvent estate.[11] In the case of a mere spoliator[12] the presumption against the wrong-doer would appear not to be quite so strong, but it still exists in a modified degree, and the spoliator will in any case be liable for the highest value of the thing since the spoliation. It has been held, for instance, that, even supposing that a defendant could escape liability by showing that the property would equally have perished if in the possession of the plaintiff, the burden of proof that it would have so perished will be upon the defendant, and he will be bound to show in addition that he has taken every care of it.[13]

The rule of law as to the owner being entitled to the highest value since the theft will apply even as regards the value to which the thing may have been enhanced by the thief himself, whether by his own labour or at his expense. Nor will it make any difference whether the property has perished or deteriorated by the wilful act of the thief, or merely through his negligence, or even by accident; nor whether it would have perished in the same way even if it had been in the possession of the owner himself or not, unless indeed the thief had tendered back the property to the owner before its perishing, and the latter had made delay in accepting it.[14]

[10] Voet, 13 : 1 : 6; 13 : 3 : 3; 47 : 2 : 10.

[11] Voet, 47 : 2 : 10.

[12] As to what is a spoliation, see vol. ii., p. 25, above.

[13] *Jersipe* v. *Hart*, 7 E. D. C. 85.

[14] Voet, 13 : 1 : 6; 13 : 3 : 3; 47 : 2 : 10.

It will make no difference for the purposes of this action whether the conversion amounted to an out and out theft of the ownership or merely to an illegal use or possession of the thing, nor whether the thing was taken by way of theft or by violence or spoliation merely.[15]

Similar principles will apply to the crime of robbery which is an aggravated form of theft, consisting as it does in the taking of movable property from the person of another or in his presence against his will by violence, or by putting in bodily fear, with the intention of appropriating such property, and converting it to one's own use.[16] As this crime, however, is a combination of the crimes of assault and theft, the rules applicable to claims of compensation arising out of it will have to be a combination of the rules applicable to cases of assault and theft respectively.

The real action for the recovery of the property itself (*rei vindicatio*), in the case of wrongful conversion, will lie against the thief or converter himself, or against his estate, as also against any person who happens to be in actual possession of the property converted;[17] but the action for compensation, in case the property has perished or is otherwise not recoverable, will lie against the thief or his executor alone.[18] Against a *bonâ fide* purchaser for value the action will not lie, if he has ceased to have possession of the property, having parted with it *bonâ fide* without any knowledge of the plaintiff's rights; but it would be otherwise if

[15] Voet, 13 : 1 : 7; 47 : 2 : 12 and 13.

[16] Voet, 47 : 8 : 1; V. L., vol. 2, p. 315; Vinnius, Inst., 4 : 2; Voet's Beginselen des Rechts, 4 : 2 : 1.

[17] Vinnius, Inst., 4 : 1 : 19. See also vol. ii., p. 86, above.

[18] *Colonial Secretary* v. *Breda's Curator and others*, 7 Buch. 14; *Myers Brothers* v. *Morgan & Co.*, 22 S. C. 492; Voet, 47 : 2 : 14 and 15; Vinnius, Inst., 4 : 1 : 19.

he has parted with the property with full knowledge and in fraud of the owner's rights.[19]

In either case the action may be brought either by the person who was owner at the time of the conversion or by his executor.[20]

Under Roman law the owner of stolen property was entitled to recover from the thief not only the thing itself by *vindicatio* or the value of the same by the *condictio furtiva*, but also, by the *actio furti*, a private penalty which varied according to circumstances from double to quadruple the value of the thing.[21] This latter action, being penal in its nature, did not pass against the heirs of the thief unless an action had been instituted against the thief in his lifetime and had reached the stage of *litis contestatio* before his death, or unless some benefit had accrued to the heir from the theft.[22] This penal action, however, became obsolete under Roman-Dutch law, and the subtlety of the Roman law, which prevented its passing against the heirs of the thief, does not apply to the purely civil action for compensation or *condictio furtiva*, which may be instituted as well against the executor of the thief as against the thief himself.[23]

As regards immovable property, under our system of registration the wrongful conversion of the ownership of land is, in the absence of fraud, practically impossible, and the only way in which such conversion can take place, as already pointed out,[24] is by means of forgery or fraud, which would make

[19] *Seal & Co.* v. *Williams*, (1906) T. S. 558; *Van der Westhuysen* v. *McDonald and Mundell*, (1907) T. S. 940, 945; Voet, 6 : 1 : 10. See also vol. ii., p. 86, above.

[20] Voet, 47 : 2 : 15.

[21] Inst. 4 : 1 : 19; V. L., vol. 2, p. 315; Vinnius, Inst. 4 : 1 : 19.

[22] Voet, 47 : 2 : 14; Vinnius, Inst., 4 : 1 : 19.

[23] Voet, 47 : 2 : 14 and 15.

[24] Vol. ii., p. 75.

any transfer of such property void, and would entitle the owner, in addition, to compensation for any damage he may suffer through the fraudulent transfer, in accordance with the general principles applicable to fraud.

Akin to the conversion of movables is the infringement of the right of statutory property, such as copyright, trade marks,[25] or patents,[26] for which an action of damages will lie in the same way as in the case of wrongful conversion. There have been no decided cases with respect to copyright in our South African Courts, but with respect to trade marks and patents there have been a considerable number.

Before dealing with trade marks some general observations on the subject of freedom of trade and illegal interference with the same will not be out of place. Every person then (subject to the restrictions of the licensing laws) is entitled to freedom of trade, that is to say, has the right to pursue his trade or calling without let or hindrance from any one. He is bound, however, to do so with a due regard to the fact that every one else, who is not expressly prohibited, is entitled to do the same, and with strict observance of the legal maxim *sic utere tuo ut alienum non lædas*. In other words, he may push his own trade or business by every legitimate means, but must abstain from any unlawful interference with similar rights in others. Amongst the rights of all workmen is the right of competition, and the same right belongs also to persons engaged in trade or commerce. No one therefore will have any right to complain of

[25] *Mills* v. *Salmond*, 4 Searle, 230.

[26] *Kemp* v. *Uppleby & Co.*, 5 Searle, 86; *Edison-Bell Phonographic Co.* v. *Garlick*, 16 S. C. 543; *Rutter* v. *Ashenden*, 22 S. C. 246; *Ransby & Covell* v. *Woudberg*, 24 S. C. 91; *Hay* v. *African Gold Recovery Co.*, 2 Off. Rep. 158 and 3 Off. Rep. 244.

competition on the part of others, provided it is conducted with legitimate means; but as soon as any unlawful means are made use of and damage is thereby caused to the trading rights of another, an action at suit of the latter will lie. An action will accordingly lie for damage caused by a person carrying on a particular trade or business, who has absolutely no right to do so,[27] or who carries it on in a place where he knows that he is not entitled to trade.[28] So also an action will lie at suit of a manufacturer or producer, if any one falsely sells goods or produce as having been manufactured or produced by such manufacturer or producer which have not been so manufactured or produced. The modes in which such false representation may be made are various. It may be made either in express terms or by means of the unauthorized use of a particular mark which has been used by such manufacturer or producer to denote that the goods are made or produced by him, and has been so used by him to such an extent that it has become understood in the market to have that meaning. This proposition is in accordance with English law and also with equity and the general principles of our common law.[29] At present, however, our law with respect to trade marks is regulated by statute.[30]

With respect to the infringement of a trade mark, it has been correctly stated that it is impossible to lay down any general rule as to what would amount to

[27] *Patz* v. *Greene & Co.*, (1907) T. S. 427.

[28] *Howorth & Fox* v. *Hart*, (1906) E. D. C. 276. See also *The Mission Trading Co.* v. *Hessel*, 9 Buch. 74; *Wallace* v. *Randall*, 3 E. D. C. 87; *Landmark* v. *Van der Walt*, 3 S. C. 300; *Scallen* v. *Gnodde*, 1 Off. Rep. 287.

[29] *Singer Manufacturing Co.* v. *Loog*, 8 App. C. 29. See also note 32, below.

[30] Act 22, 1877; Act 12, 1888; Act 12, 1895. See also note 32, below.

such infringement, or as to what would amount to such a colourable imitation of a trade mark as would be calculated to deceive. Every case must be decided on its own merits.[31]

The owner of a trade mark is not necessarily restricted to his statutory rights under the Trade Marks Acts, but will be entitled to rely upon his common law rights, and, if he can show that a fraudulent use has been made of his trade mark for the purpose of selling *as his* goods which are not his, he will have a cause of action.[32] This rule is based upon the ground that it is a fraud upon the part of the defendant in such a case to attract to himself that course of trade, or that custom, which, but for the false representation, would in the ordinary course have flowed to the plaintiff, whose name or trade mark he has fraudulently used.[33]

The deprivation of ownership or of rights generally may take place not only by means of wrongful conversion without the consent of the owner, but also with the consent of the owner, such consent, however, having been obtained or vitiated by fraud.[34]

By fraud is meant any false representation made either by word or deed with the intent to defraud, and

[31] *Reiners, Von Luer & Co.* v. *Fehr*, 2 Cape Times, 135; *Franken & Co.* v. *Pope*, 11 S. C. 209; *Price's Patent Candle Co.* v. *Everett & Co.*, *Ibid.* 213; *Somervell Bros.* v. *Cuthbert & Co.*, 12 S. C. 252; *Martell & Co.* v. *Paarl Berg Wine, Brandy, and Spirit Co.*, *Ibid.* 329; *Lever Bros.* v. *Nannucci*, 17 S. C. 507; *Jones* v. *Petersen & Co.*, 20 S. C. 401; *Dr. Williams' Medicine Co.* v. *Tothill*, *Ibid.* 483; *Exshaw & Co.* v. *Van Ryn Wine and Spirit Co.*, 21 S. C. 267; *Herman & Canard* v. *Policansky Bros.*, 22 S. C. 151; *Pasquali Co.* v. *Diaconicolas & Capsopulus*, (1905) T. S. 475.

[32] *Reiners, Von Luer & Co.* v. *Fehr*, 2 Cape Times, 135; *Lewis* v. *Lazarus*, 13 S. C. 426; *Daly & Day* v. *Giesler*, 16 S. C. 238; *Jones* v. *Petersen & Co.*, 20 S. C. 401; *Dr. Williams' Medicine Co.* v. *Alexander*, 22 S. C. 589; *Pasquali Co.* v. *Diaconicolas & Capsopulus*, (1905) T. S. 474.

[33] *Combrinck* v. *De Kock*, 5 S. C. 409.

[34] G. 3 : 37 : 3.

whereby another person has been actually defrauded or injured in his property or rights.[35] For such injury an action for compensation in damages will lie, whether the wrong-doer has benefited by the fraud or not;[36] but in order that the plaintiff may succeed in such a case actual damage will have to be proved.[37]

This kind of injury occurs most frequently in connection with contracts, and it has already been fully dealt with in treating of the voidability of contracts, to which the reader is referred.[38] We have here, however, to do more with the compensation to be paid for any damage suffered by reason of the fraud than with the voidability or otherwise of the contracts, in connection with which the fraud was committed.

Similar principles will apply to cases of fraud as to cases of wrongful conversion of property. Thus, even as the owner of stolen property may follow his property into the possession of an innocent holder and recover it from him,[39] so may the voidability of a contract on the ground of fraud be pleaded even against an innocent cessionary for value.[40] On the other hand, even as the right of the owner of stolen property to recover such property from a *bonâ fide* possessor will fail, if he has delivered the property to the person wrongfully alienating the same, under circumstances which might lead a third party to the reasonable belief that the latter was the owner of the property, or had authority from the owner to deal with the same;[41]

[35] See vol. iii., p. 63. See also the *Queen* v. *Bamford*, 7 S. C. 172.

[36] *Nathan, Michaelis & Jacobs* v. *Blake's Executors*, (1904) T. S. 626; *Cape of Good Hope Bank* v. *Fischer*, 4 S. C. 376. See also vol. iii., p. 66.

[37] Vol. iii., p. 67. See also *Queen* v. *Castleden*, 6 S. C. 236; *Queen* v. *Bamford*, 7 S. C. 173; *King* v. *Firling*, 18 E. D. C. 15; *King* v. *Picannini Skit*, 18 E. D. C. 126.

[38] Vol. iii., p. 60, *et seqq.*

[39] See vol. ii., p. 60.

[40] *Standard Bank* v. *Du Plooy and another*, 16 S. C. 168.

[41] *Adams* v. *Mocke*, 23 S. C. 782.

so a person, who has been induced by fraud to enter into a contract, will lose his right to plead such fraud as against an innocent cessionary of the same, where he has been guilty of negligence which has enabled the wrong-doer to prejudice such third party.[42] Indeed it may be laid down generally that where a question arises as to which of two innocent persons is to suffer from the fraud of a third party, it will have to be decided against the person who, by some initial act or negligence of his, has enabled the third party to perpetrate the fraud.[43] Thus, a person whose name has been forged, though not as a rule liable upon the forged document, will be held liable if he has been guilty of conduct which might reasonably induce a third party, acting with due prudence, to believe that the forger had authority to sign his name.[44]

The action will lie at suit of the person who has been injured by the fraud or by his executor, against the person who has committed the fraud or his executor.[45]

It is not necessary for the purposes of this action of compensation that the deprivation shall be complete, that is to say, that it shall extend to the rights of ownership as a whole, for it will lie even where the deprivation has been merely partial, that is, where it extends to the possession or use and enjoyment only. In any case the owner will be entitled to compensation for the extent to which his rights have been prejudiced, seeing that his right to the possession, use and enjoyment of his own property is exclusive ; but no action

[42] *Standard Bank* v. *Du Plooy and another*, 16 S. C. 161.

[43] *Colonial Government* v. *Bouwer*, 21 S. C. 477 ; *Krige* v. *Willemse*, 25 S. C. 183.

[44] *Liquidators of the Union Bank* v. *Beit*, 9 S. C. 124; *Preuss and Seligman* v. *Prins*, 1 Roscoe, 205.

[45] Voet, 4 : 3 : 9.

will lie as a rule, unless some damage, actual or implied, can be proved.

Similar rules will apply to immovable as to movable property. Thus an owner who has been illegally deprived of, or kept out of, the possession of his land, will be entitled to a similar action to that which would lie at suit of an owner of movables illegally converted.[46] A landowner, therefore, will be entitled to damages for an encroachment made on to his ground by a building of his neighbour, even though, owing to his delay in pressing his claim, the Court may refuse to order the removal of such building.[47]

Every trespass also by one man on to the land of another is in strict law a wrongful act; but, unless some damage, actual or implied in law, is established, the owner of the land will not succeed in his action. By damage, however, is meant not necessarily any damage to the land itself, but some loss to the owner, either by actual damage to the land or by an injury to his rights of ownership unaccompanied by damage to the land itself, or by reason of the trespass to the land having been committed with the object of insulting or annoying the owner, or in reckless disregard of his rights. Thus, where a person innocently and inadvertently comes on to the land of another without any ulterior object, no Court will award any compensation in damages, unless some actual damage to the land be proved.[48] It would be otherwise if the entrance upon the land was made in the exercise of some alleged right claimed by the trespasser and denied by the owner of the land, in

[46] Voet, 13 : 1 : 7.

[47] *Myburgh* v. *Jamieson*, 1 Searle, 8.

[48] Vol. ii., p. 89. See also *Crystal Diamond Mining Co.* v. *De Pass*, 1 Buch. App. C. 48.

which case the damage is to the disputed rights of ownership, for which general damages will be allowed without any special damage having been proved. Similar principles will apply where the trespass is committed intentionally, and in defiance of the owner and in reckless disregard of his rights,[49] the more so if done in order to insult and annoy the owner, in which case it will amount to an *injuria* proper.[50]

In the absence of such aggravating circumstances the measure of damages will be the actual damage done to the land; but in assessing such damages the Court will be entitled to consider all the circumstances attending the trespass, and may give damages on account of collateral facts aggravating the trespass. Thus, where the defendant, knowing that the young of certain wild ostriches had been hatched out on plaintiff's land, and that the latter would in the ordinary way, according to the custom of farmers, capture such young birds for purposes of domestication, forestalled the latter by driving the birds off his ground and capturing them and converting them to his own use, the Court, in estimating the damages, included the value of the birds, though, being *feræ naturæ*, they did not belong to the plaintiff.[51]

Most usually, however, trespass is committed through cattle or other stock being allowed to stray on to the ground of another and to do damage there, owing to negligence in herding them. This branch of trespass, however, comes more properly under the heading of negligence, under which head it will be considered further on.

[49] *Malcolm* v. *Shaw*, 15 S. C. 31; *Gosani* v. *Kreusch*, 25 S. C. 350.

[50] *Edwards* v. *Hyde*, (1903) T. S. 381; Voet, 47 : 10 : 7.

[51] *De Villiers* v. *Van Zyl*, Foord, 77.

The action of trespass may be brought not only by the owner himself, but also by any one to whom he has granted the right to the use and enjoyment of the land, whether wholly or in part, whether generally or for a specific purpose. It will, therefore, lie at suit of a lessee or other person in a similar position to a lessee, as, for instance, a person who has purchased from the owner of a farm the sole right of trading on such farm, who will be entitled to recover damages from any person who, having notice of his rights, interferes with them by coming on to the farm and trading there.[52]

A wrong to the ownership of land may be limited to mere interference with the free and undisturbed and comfortable enjoyment of such land. Every such interference is an unlawful act and a wrong for which an action will lie, provided any appreciable damage can be proved to be caused by the same. We have already dealt incidentally with a number of instances of this kind when treating of the rights of ownership in land, water rights, and rights of servitude,[53] and it is unnecessary to repeat what was there said. The same remark applies to nuisances, which are another form of interference with the rights of property in land. These, as well as other interferences with rights of ownership in land, water rights, and rights of servitude, may as a rule be put a stop to by way of interdict; but an action of damages will also lie for any loss, discomfort or inconvenience caused by them whilst in operations. The subject of nuisances has been already sufficiently dealt with in an earlier part of this work,[54] and it is therefore unnecessary to

[52] *Howarth & Fox* v. *Hart*, (1906) E. D. C.

[53] See Book II., under the different headings, and also Voet, 47 : 10 : 7. See also *Hofmeyr* v. *Hofmeyr*, 5 Buch. 141, and *Studler* v. *Hugo*, 6 Buch. 7.

[54] Vol. ii., p. 95 *et seqq.*

go over the same ground. It may, however, be as well to state here in qualification of one of the statements there made, namely, that "in the case of a public nuisance any member of the public may take steps to have it abated," that this is only the case where the person suing has himself been prejudiced by the nuisances.[55]

For damage caused to property itself, such as by the illegal killing or wounding of animals, or by the burning, breaking, or otherwise injuring or damaging movable property in such a way as to diminish its value, provision was made under the Roman law by the *lex Aquilia*, upon which our modern law is mainly based.[56] For such damage an action will lie, whether it was due to a deliberate act or to mere negligence.[57]

Cases of wilful and deliberate or malicious injury to property are fortunately very rare amongst us, and, even when they do occur, the wrong is generally committed by some criminal without means, against whom a civil action will not afford much relief. It will be sufficient, therefore, to state shortly that similar principles will apply to cases of this sort as to those of cases of wrongful conversion.[58]

The majority of cases of injury to property arise out of negligence merely, and will be separately considered under that head in the next chapter.

[55] *Baynall* v. *Colonial Government*, 24 S. C. 476. See also *Hodgson & Stein* v. *Bird*, 2 S. A. R. 268.

[56] Vinnius, Inst., 4 : 3 : pr. and §§ 1, 13; Voet's Beginselen des Rechts, 4 : 3 : 6.

[57] G. 2 : 37 : 2, 4; Vinnius, Inst., 4 : 3 : 14; Voet's Baginselen des Rechts, 4 : 3 : 6.

[58] V. D. L., p. 252.

CHAPTER IV.

DAMAGE DUE TO NEGLIGENCE.

THE term "negligence," when used in connection with damage not arising out of contract, may be defined as the non-observance of that degree of "diligence" which the law expects to be observed by every one in the ordinary relations of life, and for damage caused by the disregard of which the Courts will grant relief by way of compensation in damages. It will, therefore, have to be distinguished from the non-observance of mere "moral" obligations, of which the law takes no cognizance.[1]

Negligence or *culpa* (fault), as the Romans called it, may consist in faults of commission or of omission, or of commission and omission mixed.[2]

For a fault of omission pure and simple no one will, as a rule, be liable, unless he has bound himself by contract to the performance of a certain duty, or unless such duty has been imposed upon him by statute, or by the rules of a certain office, or the requirements of a certain business or work which he has taken upon himself.[3]

In connection with actionable wrongs the classification of negligence, which has been given in an earlier part of this work[4] with reference to contracts, namely, into (1) gross negligence (*culpa lata*), (2) ordinary negligence (*culpa levis*), and (3) slight negligence (*culpa levissima*), does not apply. The only two degrees of negligence which are of any importance are gross negligence, which is of so serious and reckless a

[1] Voet, 9 : 2 : 3 and 14.
[2] Voet, 9 : 2 : 3.
[3] Voet, 9 : 2 : 3, 14 and 17.
[4] Vol. iii., p. 81.

character as to amount almost to a deliberate act, and ordinary negligence, which will entitle an injured person to compensation in damages, provided it is not so slight as to shade off into mere accident.[5] The decision as to which of these two degrees of negligence has been present in any particular case will be entirely a matter of fact to be decided by the Court sitting as a jury, and is of importance inasmuch as the Court will be justified, where negligence is so gross as to amount to deliberate act or malice, to grant vindictive or exemplary damages.

The true test as to whether there has been negligence or not is whether the damage or injury complained of is such as a reasonable man or *diligens paterfamilias* would have foreseen as likely to result from the act or conduct which is in question.[6] It must, however, be proved in every case that the damage alleged was the result of the wrongful negligence complained of, or, in other words, that the defendant's negligence was the proximate cause of the injury to the plaintiff, and that the injury was not merely due to natural causes, or to accident, or to the acts or negligence of others.[7]

For accident or the act of God no one is, as a rule,

[5] *Hume* v. *Divisional Council of Cradock*, 1 E. D. C. 124; Vinnius, Inst., 4 : 3 : 2.

[6] *Newman* v. *East London Town Council*, 12 S. C. 74; *Cape Divisional Council* v. *Langford*, 14 S. C. 151. See also *Evans* v. *Bucknall Steamship Lines*, 24 S. C. 61; *Skinner* v. *Johannesburg Turf Club*, (1907) T. S. 858.

[7] *Jordens* v. *Cape Divisional Council*, 11 S. C. 158; *Cape Divisional Council* v. *Langford*, 14 S. C. 148; *Cape of Good Hope Bank* v. *Fischer*, 4 S. C. 374, 378 *et seqq.*; *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, 17 S. C. 110; *McBrien* v. *Childs*, 4 E. D. C. 35; *Keet* v. *Henwood and others*, 15 Cape L. J. 214; *Lord* v. *Union Steamship Co.*, 6 E. D. C. 141; *King* v. *Union Castle Mail Packet Co.*, 15 E. D. C. 26; *Joubert* v. *Scott, Guthrie & Co.*, (1903) T. S. 214; *Parker* v. *No.* 1 *Tin Syndicate*, (1906) T. S. 576; *Metropolitan Tramways Co.* v. *Cape Town Town Council and Cape Town Gas Co.*, 23 S. C. 397; *Naumann* v. *Johnson*, 2 Off. Rep. 190.

liable;[8] but "where a thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care or negligence."[9]

An exception to the rule as to non-liability for accident has been introduced into our law by the Workman's Compensation Acts,[10] which make employers engaged "in any trade, business or public undertaking" liable to their employees for any *accidental* injury arising out, and in the course, of their employment, provided the case falls within the terms of those Acts, and provided the provisions of those Acts have been complied with.[11]

It is not necessary that there should be an immediate connection between the negligence of the defendant and the injury complained of, provided only that the wrongful act or negligence of the defendant gave the original impulse to a series of events which ultimately culminated in the injury in question by the natural succession of cause and effect.[12] So where two wagons are following each other up an incline, and the leading one, through some negligence on the part of the driver, runs backward against the horses of the hinder

[8] *Cowell* v. *Friedman & Co.*, 5 H. C. 22; *Hume* v. *Divisional Council of Cradock*, 1 E. D. C. 122; *Henly* v. *Port Elizabeth Town Council*, 4 E. D. C. 303; *O'Brien* v. *Childs*, 4 E. D. C. 35; Voet, 9 : 2 : 14; G. 3 : 34 : 4; Vinnius, Inst., 4 : 3 : 8.

[9] Per Erle, C.J., in *Scott* v. *London and St. Katherine Docks Co.*, 3 H. & C. 596, quoted by Laurence, J., in *Cowell* v. *Friedman & Co.*, 5 H. C. 29. See also *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, 17 S. C. 111; *Liddell* v. *Transvaal Government*, (1906) T. S. 868, 881; *Fick* v. *De Klerck*, (1907) E. D. C. 294; *Davidson* v. *South African Lighting Association*, Ibid. 312.

[10] Act 40, 1905, and Act 41, 1906.

[11] Act 40, 1905, sec. 6 *et seqq.*

[12] Voet, 9 : 2 : 25.

one, which in its turn begins to back and does some injury, the driver of the leading wagon will be liable.[13] So also where a dangerous agency has been set in motion through negligence of the defendant of such a nature that a reasonably prudent person, impelled by the instinct of self-preservation, would naturally try to avoid it, and the plaintiff suffers injury in the attempt to avoid it, the defendant will be liable for the same, even though the plaintiff would, as a matter of fact, have escaped harmless, if he had made no such attempt. Thus where the plaintiff jumped from his cart, which, through the shying of his horse, was threatening to be precipitated into an excavation wrongfully left unguarded by the defendants, and broke his leg in so doing, the defendants were held liable, though as a matter of fact the cart did not fall into the excavation, and the plaintiff, if he had not jumped out, would have sustained no injury.[14] This rule, however, will not apply, where the effort to avoid a danger is made without reasonable cause.[15]

Where two persons are guilty of two separate and distinct acts of negligence, both of which have contributed to an injury, both will be liable.[16]

For negligence by way of omission, as already stated, no one is as a rule liable, unless he has bound himself by contract to do what he has omitted to do,[17] or unless a duty is imposed upon him by statute[18] or custom or by the rules of some office, or the requirements of some business or occupation which he has undertaken.[19]

[13] Voet, 9 : 2 : 25; V. L., vol. 2, p. 326.

[14] *Newman* v. *East London Town Council*, 12 S. C. 74, 75. See also *Boughey* v. *Bredell*, (1904) T. S. 398.

[15] *Newman* v. *East London Town Council*, 12 S. C. 74, 75.

[16] *Ibid.*

[17] Voet, 9 : 2 : 3.

[18] *Naumann* v. *Johnson*, 2 Off. Rep. 190.

[19] *Reed* v. *De Beer's Consolidated Mines*, 9 S. C. 342; Voet, 9 : 2 : 14.

Where a clearly defined legal duty, for instance, is imposed upon a public body, such as a municipal or divisional council, or upon an individual, such as a Government official, and damage results, of which the neglect or breach of the duty is the proximate cause, the liability of such body or individual is beyond doubt.[20] No such liability will, however, arise where the duty has not been definitely imposed, or where the breach of the same is not the proximate cause of the damage;[21] and the liability may be avoided if it can be shown that the performance of the duty was rendered impossible by the act of God or the King's enemies. In this latter case the defendant will have to show by distinct and clear evidence that he has used all reasonably practicable endeavours to surmount the difficulties in the way of his performance of his duty, but has found them insurmountable.[22]

Whether a public body is under any obligation to perform any particular duty will depend upon the wording of its constitution or of the statute by which it has been created.[23]

With respect to the duties imposed by statute, the following general rules with respect to statutory duties and penalties have been laid down by the Supreme Court of the Cape Colony:[24]

(1) Where a statute or statutory bye-law enacts that a certain thing shall be done for the benefit of a

[20] *Liesbeck Municipality* v. *Partridge*, 4 S. C. 302; *Jordaan* v. *Worcester Municipality*, 10 S. C. 163; *O'Shea* v. *Port Elizabeth Town Council*, 12 S. C. 158; *New Gordon Diamond Mining Co.* v. *Du Toit's Pan Mining Board*, 9 S. C. 150; *Haarhoff's Trustee* v. *Frieslich*, 11 S. C. 339.

[21] *Haarhoff's Trustee* v. *Frieslich*, 11 S. C. 339.

[22] *Hay* v. *Divisional Council of King Williamstown*, 1 E. D. C. 101.

[23] *Manuel* v. *Cape Town Town Council*, 7 Buch. 107.

[24] *Liquidators of the Cape Central Railway* v. *Nothling*, 8 S. C. 27.

person, he has, in the absence of any indication in the statute or bye-law of an intention to the contrary, a civil remedy for any special damages sustained by him by reason of any non-compliance with the terms of the statute or bye-law.

(2) Where the enactment is for the benefit of the public, any one of the public who, in the course of a lawful occupation, is injured in his person or property by any failure to comply with the enactment has, in the absence of any indication to the contrary, a remedy in damages against the person upon whom the statutory duty is cast.[25]

(3) Where a statute does not create a new duty, but merely provides a remedy for breach of an existing duty, it would require very clear and express language to justify the conclusion that the legislature intended to substitute the new remedy, whether it be of a civil or criminal nature, for the existing remedy.

(4) Where a new duty is created, and by the same statute which creates such duty a penalty is imposed for breach of the duty, the question arises whether the infliction of the penalty is the only remedy intended by the legislature, or whether a person who has been damaged by the breach of such duty is entitled to recover damages by civil action.

The test suggested by this last rule was applied in the case of the *Liquidator of the Cape Central Railway* v. *Nothling*,[26] in which it was decided that as, in the absence of any statutory enactment, a railway company is under no obligation to fence a line which it has been empowered to construct, any company coming

[25] See also *Wright* v. *Paterson*, 5 E. D. C. 390, and *Bagnall* v. *Colonial Government*, 24 S. C. 477.

[26] *Liquidator of the Cape Central Railway* v. *Nothling*, 8 S. C. 25.

under the provisions of sec. 29 of Act 19, 1861, which created the new duty of fencing railway lines, and imposed a penalty for the breach of the same, was only liable to the penalty therein provided, and was not liable in addition to damages at suit of any person specially damaged through the neglect or breach of the duty. This would not, however, prevent a company from being held liable for any negligence independent of, and in addition to, the mere neglect to fence, which contributed to the damage in question. The company was consequently held liable in the particular case for the destruction of certain cows which had strayed on to their line, on the ground that the driver of their engine, after he saw the cows on the line, might with ordinary care and precaution have prevented the accident.

A similar case arose in connection with sec. 30 of Act 19, 1861 (which has, however, been repealed and superseded by Act 31, 1896), which provides that if a railway crosses any public road on the level, the company is to erect and at all times maintain good and sufficient gates across such roads, which gates are to be kept constantly closed, except when the roads are being actually used for crossing the railway, and imposes a penalty for the breach of the duty. In this case a gate had been left open in breach of the provisions of the section, and the plaintiff's cow, having strayed on to the line, was killed, and the Court held that it was unnecessary to decide whether the same rule would apply to this section as to the 29th, inasmuch as there was other evidence of negligence on the part of the servants of the company which led to the accident.[27]

[27] *Metropolitan and Suburban Railway Co.* v. *De Villiers*, 10 S. C. 211. See also *Nel* v. *N. S. A. Railway Co.*, 2 Off. Rep. 165.

Under Act 10, 1864, and Act 22, 1873, Divisional Councils were bound to keep the *main* roads under their charge in good and substantial repair, and in condition for use and traffic, and if any such road fell into a state of disrepair owing to some negligence on their part, they were liable for any damage resulting from the same.[28] Similar responsibilities rested upon them with respect to *divisional* roads under Act 9, 1858.[29]

The liability of Divisional Councils is at present regulated by Act 40, 1889, which imposes upon such Councils the *duty* of making all *divisional* roads, and of superintending, maintaining, keeping in repair, preserving, and improving all *main* and *divisional* roads within their respective divisions,[30] and any Divisional Council would therefore be liable for damage resulting from the breach of this duty, and it would seem that this liability would attach even as regards a road which, through some oversight, has not been proclaimed a divisional road, but which has been treated as such by the Council, and upon which a toll has been established by it.[31] The Act also authorizes Divisional Councils to appropriate portions of their funds to the making or improving of other *public* roads, not being main or divisional roads,[32] but imposes on them no obligation to keep *all* public roads in repair.[33] With respect to such public roads, therefore, Divisional Councils are in the same position as

[28] *Hume* v. *Divisional Council of Cradock*, 1 E. D. C. 104 and 1 Buch. App. C. 27; *Bouwer* v. *Divisional Council of Albany*, 7 E. D. C. 211; Act 10, 1864, sec. 2, and Act 22, 1873, sec. 5.

[29] *Rivenhall* v. *Divisional Council of Tarka*, 5 E. D. C. 355; Act 9, 1858. sec. 20.

[30] *Jordens* v. *Cape Divisional Council*, 11 S.C. 158; Act 40, 1889, sec. 141.

[31] *Rivenhall* v. *Divisional Council of Tarka*, 5 E. D. C. 355.

[32] Act 40, 1889, sec. 278.

[33] *Cathcart Divisional Council* v. *Hart*, 9 S. C. 80.

Municipal Councils falling under Act 45, 1882, which empowers Municipal Councils to execute and repair certain works, such as roads and drains,[34] but imposes upon them no absolute duty to do so. Municipal Councils have accordingly been held to be under no obligation under this statute to keep in repair all roads, to the use of which the inhabitants of any municipality may have a common right,[35] and consequently not to be liable for injury or damage caused by the disrepair of such roads.[36]

One thing, however, is clear, and that is that where any public body, whether Municipal Council or Divisional Council, takes upon itself to do any particular work, whether bound by law to do so or not, it will be obliged to execute the same with due care and diligence, and in such a manner as not to cause injury to the person or property of individuals by its negligence.[37] Consequently, if such works are constructed in a negligent and improper manner, and damage is caused to individuals, such public body will be liable.[38] Where, however, a statute authorizes a public body to execute a specific work, which cannot be executed without interfering with the rights of, and injuring, third parties, it must be assumed that the

[34] Act 45, 1882, sec. 156.

[35] *Liesbeek Municipality* v. *Partridge*, 4 S. C. 300. See also *Jordaan* v. *Worcester Municipality*, 10 S. C. 163.

[36] *Liesbeek Municipality* v. *Partridge*, 4 S. C. 300. See also *Thorpe* v. *Municipal Council of Pretoria*, (1905) T. S. 787.

[37] *Liesbeek Municipality* v. *Partridge*, 4 S. C. 303; *Manuel* v. *Cape Town Town Council*, 7 Buch. 107, and 3 Roscoe, 2; *Searight & Co.* v. *Cape Town Town Council*, 17 S. C. 78; *O'Shea* v. *Port Elizabeth Town Council*, 12 S. C. 158; *Port Elizabeth Municipality* v. *Nightingale*, 2 Searle, 214; *East London Municipality* v. *Murray*, 9 E. D. C. 55.

[38] *Manuel* v. *Cape Town Town Council*, 7 Buch. 110; *Kimberley Town Council* v. *Von Beek*, 1 Buch. App. C. 109; *Kimberley Town Council* v. *Mathieson*, 1 Buch. App. C. 119; *Kimberley Town Council* v. *Murtha*, 1 Buch. App. C. 282; *De Kock* v. *Town Council of Cape Town*, 4 S. C. 458; *Cathcart Divisional Council* v. *Hart*, 9 S. C. 80.

legislature authorized such interference and injury, provided only that the work is performed in a proper manner and without negligence.[39]

As regards duties imposed by custom, we may refer to the case of *Murtha* v. *Von Beek*,[40] in which it was admitted as a matter of common cause that there is an implied obligation upon any claim-holder in a diamond mine to use reasonable diligence in working down his claims, and not to lag behind unnecessarily to the injury and detriment of his neighbours,[41] though there is no obligation to work *pari passu* with his neighbours.[42] It was accordingly held that any negligence in working down, which caused damage to another claimholder, would entitle the latter to damages.[43]

Public officials are bound to carry out the duties of their office in accordance with the law and with the regulations of the office which they have accepted. The Registrar of Deeds, for instance, is bound to see that all documents presented to him for registration are duly registered. If, therefore, a properly executed mortgage bond has been passed before him, and is presented to him for registration, it is his duty to register it in the manner required by law, and if he fails in this duty he will be liable to the mortgagee for any damage occasioned by the latter's loss of preference.[44]

The Sheriff also has certain duties imposed upon him by virtue of his office, the principal of which is

[39] *Tobiansky* v. *Johannesburg Town Council*, (1907) T. S. 143, 151.

[40] *Murtha* v. *Von Beek*, 1 Buch. App. C. 121.

[41] *Goode and Smith* v. *Hall*, 1 H. C. 530; *Murtha* v. *Von Beek*, 1 Buch. App. C. 121.

[42] *Hall* v. *Compagnie Française*, 1 H. C. 464.

[43] *Murtha* v. *Von Beek*, 1 Buch. App. C. 121.

[44] *Cape of Good Hope Bank* v. *Fischer*, 4 S. C. 375 and 376. See also in *In re Carter*, 2 Menzies, 340, an *obiter dictum* of Menzies, J.

the execution immediately and without delay, by himself or through his deputies (for whom he will be responsible), of all sentences, decrees, judgments, writs, summonses, rules, warrants, orders, commands and processes of the Supreme Court or any Circuit Court, and the making of a return thereof to the Registrar of such Court, and the receiving and detaining in custody of all persons arrested upon any such sentence, decree, judgment, writ, summons, rule, warrant, order, command or process.[45] If, therefore, he fails to perform any of these duties in the due and proper manner, and loss ensues to any person, he will be liable to make good such loss. He is, for instance, bound to exercise reasonable care and diligence in carrying out writs of execution;[46] and consequently, if he fails to attach goods belonging to the defendant, which are available for attachment, he will be liable to the plaintiff for the amount of the goods he has omitted to attach,[47] as he will also be if he negligently accepts insufficient security for the production of goods attached by him.[48] He will also be liable for negligently attaching or selling in execution the property of a third party, when he might, by instituting reasonable enquiries, have ascertained that such property did not belong to the defendant; as well as for attaching property belonging to the defendant[49] indeed, but which, being immovable property, was attached and sold by him without its

[45] Charter of Justice, sec. 27; Ord. 37, 1828, sec. 3.

[46] *Dersley* v. *Wagner*, 5 E. D. C. 251.

[47] *Heugh and Fleming* v. *High Sheriff*, 2 Searle, 280; *Skeen* v. *Coetzee*, 2 Off. Rep. 32. See also *Andrews* v. *Knight Brothers and Gibson*, (1906) E. D. C. 241; *Meyer* v. *Schomberg*, 1 Menzies, 545; and Voet, 20 : 5 : 7, 8, 12.

[48] *Allen* v. *Crosby and Holland*, 5 E. D. C. 260.

[49] *Olivier* v. *Keating*, Foord, 102; *Sieberhagen* v. *Keller and Chandler*, 21 S. C. 205; *Myckulu* v. *Simkins*, 1 Cape Times, 115; *Van der Merwe* v. *Turton and Juta*, Kotze, 155; *Cochrane* v. *Ngesman*, 23 S. C. 140.

having been first declared executable, thus prejudicing the rights of the mortgagee.[50] He will also be held responsible for any injury resulting from an erroneous return which has been falsely or negligently made by him.[51]

In no case, however, will a Sheriff be liable, if he has acted in good faith and exercised due care and diligence.[52]

Similar rules will apply to a police officer who executes a warrant of arrest with undue harshness or want of due consideration, and not in due accordance with the duties imposed upon him by his office;[53] and also to a gaoler who negligently allows a person undergoing civil imprisonment to escape.[54]

Trustees of an insolvent estate will also be liable for any loss caused to the estates under their charge, owing to their failing to exercise any powers entrusted to them.[55]

CHAPTER V.

NEGLIGENCE IN THE KEEPING OF ANIMALS.

Under Roman law any damage caused by an irrational animal was called *pauperies*. For such damage the owner of the animal was liable through the mere fact of his being the owner, and though he might himself have been free from all blame in the matter. The liability for such damage, in fact, attached to the ownership and

[50] *Kimberley Mutual Building Society* v. *Lewis and others*, 1 H. C. 241.

[51] *Haycroft* v. *Filmer*, 1 Roscoe, 98.

[52] *Ashburner* v. *Ryan*, 2 Cape Times, 112; *Brits* v. *Roos and Coetzee*, Hertzog, 113; *Judelowitz's Trustee* v. *Sheriff*, (1904) T. S. 839; *Van Broembsen* v. *Bellamy*, 25 S. C. 456.

[53] *Jacobs* v. *Evans*, 2 Buch. 29; *Rigg* v. *Roper and Jackson*, 4 S. C. 117.

[54] Voet, 48 : 3 : 7, *in fine*.

[55] *Marsh* v. *Barry and another*, 5 S. C. 217.

followed it wherever it went. Where, therefore, there had been a change in the ownership since the causing of the damage, it was the person who was owner at the date of the action, and not he who had been so at the time of the infliction of the injury, who was liable for the damage.[1] The apparent injustice of this law was, however, tempered by the rule that the defendant in such an action could always escape liability by giving up the animal which had done the damage, and which was called the *noxa*, to the plaintiff.[2] The action applicable to a case of this sort was the *actio de pauperie*, but was held not to apply to the case of damage caused by a wild animal which had been kept in captivity for some time and had then effected its escape and done damage, inasmuch as the ownership ceased immediately upon such escape, and so also consequently did the liability which attached to such ownership.[3]

The Roman law on this point was, according to some Roman-Dutch authorities,[4] adopted in the Netherlands, but other authorities are of a different opinion. All doubt on this point has been removed in the Cape Colony, where it has been decided that the *actio de pauperie*, in so far as it was based upon the mere fact of ownership, and could be met by the surrender of the animal which had done the damage, has become obsolete in South Africa.[5] Under our law the liability of a man for damage done by an animal belonging to him is entirely based upon negligence,[6] no one being liable for damage due to mere accident.[7]

[1] Inst. 4 : 9 : pr.; Voet, 9 : 4 : 5.

[2] *Le Roux and others* v. *Fick*, 9 Buch. 35; *Graham* v. *Viljoen*, 8 Buch. 127; *Parker* v. *Reed*, 21 S. C. 503; Voet, 9 : 1 : 2.

[3] Inst. 4 : 9 : pr.

[4] Voet, 9 : 1 : 8; 9 : 4 : 10; Groen., De Leg., Inst., 4 : 9 : pr.; G. 3 : 38 : 10; R. Obs., part 2, obs. 94.

[5] *Parker* v. *Reed*, 21 S. C. 496.

[6] *Parker* v. *Reed*, 21 S. C. 502; *Spires* v. *Scheepers*, 3 E. D. C. 176.

[7] *Cowell* v. *Friedman & Co.*, 5 H. C. 22; Voet, 9 : 2 : 14; 9 : 1 : 5.

A man is at full liberty to keep on his premises any animal he pleases, but he must use this liberty subject to the legal maxim *sic utere tuo ut alienum non lædas*, and the degree of diligence required of him in the keeping of such animal will vary according to the nature of the animal and the circumstances of each case. Consequently, if a landowner keeps on his ground animals which have a natural tendency to violence or mischief, either of a particular kind or generally, it is his duty to ensure that they do no harm to property or persons who happen to be where they have a right to be, and if he fails in this respect, and damage is caused to another, either in person or property, he will be liable.[8] If, for instance, a person keeps animals, such as cattle or sheep, which are by nature inclined to roam about in search of food, he will be guilty of negligence if he allows them to stray on to a neighbour's ground, and will be liable to make compensation for any damage they may do there either to standing crops or the natural vegetation, or to harvested grain or any other property there being.[9]

The action will lie not only at suit of the owner of the land trespassed upon, but also of any one, such as a lessee, who has acquired the right of occupation from the owner, and even at suit of a *bonâ-fide* occupier.[10]

The fact that the land trespassed upon was not fenced or otherwise enclosed, or that the defendant's cattle got on to the plaintiff's land owing to the disrepair of the fences, will be no defence, unless there be some obligation on the plaintiff by contract or otherwise to fence his ground and keep his fences in repair,

[8] *Le Roux and others* v. *Fick*, 9 Buch. 33; *Hall* v. *Masea*, 23 S. C. 746; G. 3 : 33 : 6; V. L., vol. 2, p. 324.

[9] Voet, 9 : 1 : 24; V. L., C. F., part 1 : 5 : 31 : 4.

[10] *Stadler* v. *Hugo*, 6 Buch. 7.

and Sections 13 and 14 of Act 30, 1883, impose no such obligation.[11]

It may be laid down generally, however, that the Courts will not encourage actions of damages for trespass, and will not necessarily grant damages in every case of trespass, but, in the absence of aggravating circumstances, as has already been pointed out with respect to personal trespass,[12] will require actual damage to be proved, cases of mere nominal damages being regarded as sufficiently provided for by the exercise of the owner's statutory or common law right to impound cattle trespassing on his ground.[13]

As regards the general rights of a landowner with respect to cattle trespassing on his ground, it may be laid down that he may drive such cattle off his ground and sue for damages, or he may send them to the pound, claiming compensation in terms of the statutory enactments with regard to pounds, but he may not detain them in his own stable or kraal for more than twenty-four hours.[14] It may be as well to add, however, that the statutory right to impound does not in any way interfere with the landowner's right to proceed by way of action,[15] and that whether he has abstained from impounding altogether or, having impounded, has omitted to claim damages in terms of the provisions of the statute.[16]

In addition to the above rights, a landowner is

[11] *Adams* v. *Klerck*, 16 S. C. 456.

[12] See p. 37, above.

[13] Act 15, 1892; Ord. 16, 1847; G. 3 : 38 : 1; V. L., vol. 2, p. 324; *R.* v. *Ntlonga*, 19 S. C. 233; *Behr* v. *Murray*, 2 Buch. App. C. 302; *Murray* v. *Behr*, 19 E. D. C. 207; *Stuurman* v. *Van Rooyen*, 10 S. C. 35; *Conradie* v. *Gray*, 21 S. C. 454; *Rabie* v. *Olifant*, 1 E. D. C. 362; Voet, 9 : 1 : 3.

[14] Act 15, 1892, sec. 29; *Edwards* v. *Hyde*, (1903) T. S. 384; Voet, 9 : 1 : 3; 2 : 4 : 28; V. L., C. F., part 1 : 5 : 31 : 4.

[15] Act 15, 1892, sec. 75, Ord. 16, 1847, sec. 46.

[16] *Thomson* v. *Schietekat*, 10 S. C. 46.

entitled to destroy all pigs, poultry, or pigeons found trespassing in any garden, vineyard, or orchard, or in any place upon which any species of cultivated crop is growing or, having been gathered, is still lying, or in any place containing grain. He may also do the same by any dog trespassing in any vineyard or raisin ground between the 1st of December and the 1st of May and doing mischief therein, or found trespassing in any camp or enclosed place in which there is game or other animals,[17] and in districts in which a dog-tax has been imposed even upon unfenced land.[18] He will also in any district be entitled to shoot on unenclosed lands any dog found chasing sheep.[19]

Proceeding to other domestic animals which do mischief in accordance with their natural instinct, it is found that horses, unless tied up or confined, have a tendency to rush about; and to leave them loose or unconfined is therefore regarded as an act of negligence. Consequently, where a carrier had been in the habit, when returning from work with his horses, to leave them loose with their harness on in a yard which opened on to a street, and one of the horses on one occasion suddenly bolted through an unused door, and ultimately got into the street and caused damage to the plaintiff by colliding with his cart, the carrier was held liable.[20] On the other hand, a plaintiff failed in his action where the defendant's horse bolted owing to the breaking, through a latent defect, of a bolt in

[17] Act 15, 1892, sec. 26; *Duthie* v. *Benn*, 11 S. C. 38.

[18] Act 40, 1889, sec. 226, *in fine*; *Willmer* v. *Rance*, 21 S. C. 423.

[19] *Snodgrass* v. *Pretorius*, 9 E. D. C. 125. It may also be noted here that the destruction of dogs is also provided for by some Municipal Statutes and Regulations, but in that case such destruction must take place in strict conformity with such Regulations, otherwise a person killing a dog will be liable in damages (*Hull* v. *Municipality of Victoria West*, 2 S. C. 113).

[20] *Wiblin* v. *Webber*, 9 E. D. C. 71. See also *Joyce* v. *Arlosoroff*, 24 S. C. 45.

defendant's carriage, which resulted in a collision with and damage to plaintiff.[21]

Similar principles apply with even greater force to the keeping of wild animals in captivity. When, therefore, a person keeps a wild animal in a state of captivity, and allows it to escape, and it does damage to the person or property of another, the nature of the animal will in itself be a warning of its natural tendency to do harm, and of the consequent necessity of keeping it under control, and allowing it to escape will in itself be evidence of negligence. Thus, it has been held not to be necessary to prove the owner's previous knowledge of the mischievous propensities of a monkey which, having been allowed to escape, had bitten another person.[22]

Dogs also are classed with wild animals or animals *feræ naturæ* in their tendency to do violence or mischief,[23] and it is consequently not necessary, when a dog does any damage, to prove that its owner was aware of previous ferocity or tendency to bite or do mischief on its part.[24] This doctrine must, however, be taken with the qualification that the person or animal injured by the dog was at the time of the injury lawfully at the place where the injury was caused.[25] Where, for instance, a dog had on his own master's ground bitten an ostrich which was trespassing there, it was held that the owner of the ostrich could not recover.[26]

There is nothing to prevent a person from keeping a watchdog for the protection of his premises at night,

[21] *Cowell* v. *Friedman & Co.*, 5 H. C. 22.

[22] *Beatty* v. *Donelly*, 6 Buch. 51.

[23] *Le Roux and others* v. *Fick*, 9 Buch. 33 and 36; Voet, 9 : 1 : 5; 21 : 1 : 12.

[24] *Graham* v. *Viljoen*, 8 Buch. 126; G. 3 : 38 : 13.

[25] *Serfontein* v. *Petersen*, 6 Buch. 103; *Le Roux and others* v. *Fick*, 9 Buch. 42; *Storey* v. *Stanner*, 1 H. C. 40; *Kuit* v. *Union-Castle Steamship Co.*, 22 S. C. 39.

[26] *Drummond* v. *Searle*, 9 Buch. 8.

provided he takes care that the dog is properly secured during such times as it may reasonably be expected that persons may lawfully come on to the premises. If during such a time any person comes on to the premises for a lawful purpose and without any negligence of his own is bitten by the dog, the owner will be liable. If the dog was tied up at the time, the fact of its being so tied up ought to be sufficient warning to visitors not to come within reach, and, if they do so and get bitten, they will have only themselves to thank for their carelessness.[27] If, however, the dog, when allowed to be loose, either in the daytime or at night, strays off his master's ground into the street or on to the land of another and does damage there, its owner will be liable.[28]

The owner of an animal may, by special agreement with a particular person, contract himself out of liability for the future acts of his animal, and this may be done either in express terms or tacitly by implication. Thus, where the plaintiff, having due warning beforehand of the dangerous propensities of an ostrich on the defendant's farm, especially as regards himself, contracted to do some work there, and was subsequently injured by the bird, he was not allowed to recover damages for such injury.[29]

Where there are several joint owners of an animal which does damage, each will be liable *in solidum*, but, one paying, the others will be absolved.[30]

Where bulls fight and one kills the other, without its being shown which was the aggressor, Voet lays it

[27] Voet, 9 : 1 : 6.

[28] *Le Roux and others* v. *Fick*, 9 Buch. 42; *Grier* v. *Miller*, 4 Cape L. J. 286.

[29] *Spires* v. *Scheepers*, 3 E. D. C. 173.

[30] *Graan* v. *During*, 2 S. C. 308; *Nel* v. *Halse*, 6 S. C. 275; Voet, 9 : 1 : 7.

down that no action will lie; but, if it be shown which was the aggressor, and the animal which is attacked is killed, the owner of such animal will be entitled to recover, but not if the animal which was the aggressor is killed. Nay, even if one animal so excites another that the latter does damage, the owner of the former animal and not of the latter will have to be sued, as where an ox pokes a horse with its horns, causing the horse to kick and kill an animal belonging to a third party, the owner of the ox and not of the horse will be liable.[31]

On similar principles an owner will not be liable for damage done by his animal in consequence of its having been excited or irritated either by the injured person himself or by a third party. In the latter case the person who excited the animal or set it on, will be liable.[32]

CHAPTER VI.

DAMAGE DUE TO DANGEROUS OCCUPATIONS AND AGENCIES.

From damage caused through the keeping of wild animals we pass by an easy and natural transition to damage resulting from other dangerous agencies and occupations. Such damage usually arises in connection with the ownership of land as to which, as we have already shown,[1] the maxim of our law is *sic utere tuo ut alienum non lædas*. No landowner, therefore, will be allowed to keep his ground or the buildings thereon in such a condition as to be a danger to his neighbours or the general public,[2] nor will he be entitled to carry

[31] Voet, 9 : 1 : 5.

[32] *Sheard* v. *James*, 6 Buch. 101; *Doig* v. *Forbes*, 7 S. C. 119; Voet, 9 1 : 4, 5 and 6; G. 3 : 34 : 7.

[1] See vol. ii., p. 94.

[2] V. L., C. F., part 1 : 5 : 31 : 5.

on any dangerous occupation thereon, unless he does so with such care and diligence as to ensure his neighbours and the general public as far as possible against any danger arising therefrom.[3] A landowner will consequently be liable to make compensation for damage caused to a neighbour's property by the falling of a gable standing on his ground.[4]

Of dangerous agencies one of the most common is fire. Where a person makes a fire on his own ground, whether to destroy rubbish or to keep down the vegetation, he is bound to use the greatest diligence and care, and to take every precaution, for if he does not and the fire spreads on to the land of a neighbour and does damage there, he will be liable for the same.[5] Thus where a landowner negligently kindles a grass fire on his land on a windy day or at a dangerous time of the year and fails to have it properly watched or does not provide a sufficient number of men to watch and control the fire, he will be held liable for any damage done to the pasturage of his neighbour.[6] But this will not be the case, if he has taken every precaution, and the injury is caused by a sudden and unforeseen gust of wind.[7]

Where persons who are wrong-doers and trespassers light a fire and damage is caused thereby, it will be

[3] *Fleming* v. *Rietfontein Deep Gold Mining Co.*, (1905) T. S. 117; *Clair* v. *Port Elizabeth Harbour Board*, 5 E. D. C. 311; *Elmer* v. *Warren*, 5 E. D. C. 385; *Apollis* v. *Joram*, 12 E. D. C. 187.

[4] *Kaiser* v. *Shenker & Co.* 21 S. C. 317.

[5] *Glass* v. *Grahamstown Town Council*, 18 E. D. C. 244; *Van Tonder* v. *Alexander*, (1906) E. D. C. 186; *Foxcroft* v. *Meiring*, (1907) E. D. C. 113; Act 18, 1859; Voet, 9 : 2 : 19; G. 3 : 38 : 2; Schorer, Note 483; Vinnius, Inst., 4 : 3 : 14.

[6] *Apollis* v. *Joram*, 12 E. D. C. 187; *Glass* v. *Grahamstown Town Council*, 18 E. D. C. 249; *Van der Byl* v. *De Smidt*, 2 Buch. 183; *Combrinck* v. *Myburgh*, 1 Cape Times, 130, 135; *Lotter* v. *Rhodes*, 19 S. C. 122.

[7] *Glass* v. *Grahamstown Town Council*, 18 E. D. C. 246; *Van Reenen and another* v. *Cloete*, 2 Buch. 219; Voet, 9 : 2 : 19.

presumed that the damage was caused through misconduct or negligence.[8]

A person who, having undertaken to watch a fire, negligently fails to do so, in consequence of which the fire spreads and sets fire to the property of a third party, will be liable.[9]

Where a fire originates in a house and a neighbour sues for compensation for damage caused by the same, the burden of proof as to whether the fire was due to negligence on the part of the owner of the house in which it started, will be upon the plaintiff, both because he is the plaintiff and because in case of doubt every one is presumed to be careful and diligent, until the contrary be proved.[10]

Electricity is an even more dangerous agency than fire, and any one dealing with electricity is consequently bound to guard the public against any possible damage which may result from its use by taking every necessary precaution. Consequently, where a Town Council had been guilty of negligence in connection with its electric lighting wires, which caused serious injuries to an individual, it was held liable in damages.[11]

With regard to other dangerous operations, the degree of care and caution required in carrying them on will vary according to the locality in which they are being conducted. Thus a person who prunes trees in a portion of his own ground where people are not in the habit of passing, need use only very ordinary care to see that no one is underneath when the lopped branches fall down. But he will have to be more

[8] *Van der Westhuizen* v. *Smith and others*, (1905) T. S. 109.

[9] Voet, 9 : 2 : 19.

[10] Voet, 9 : 2 : 19; G. 3 : 38 : 2; Schorer, Note 483; V. L., C. F., part 1 : 5 : 31 : 7.

[11] *Kift* v. *Cape Town Town Council*, 17 S. C. 465.

careful when he does so near to a thoroughfare, whether public or private, for if he allows branches to fall down there without giving warning to passers-by to stand from under, and any injury is done to a person lawfully using the thoroughfare, he will be liable;[12] and *à fortiori* will he be so, if he intentionally allows something to fall down on any one passing underneath, even though he may not do so maliciously.[13]

In the same way there is nothing to prevent a landowner from making excavations on his own ground in the exercise of his rights of ownership,[14] but he must take care that these be not dangerous to persons who happen to be there as a matter of right. Thus, if excavations are made at a retired spot on one's own ground, remote from any place frequented by the public, very ordinary care may be sufficient to guard against persons falling into the same or there need even be no precaution at all;[15] but it would be otherwise where such excavations are made close to a thoroughfare or other place frequented by the public.[16] If an excavation is so near to a road as to be a source of danger to people lawfully using the road, the owner of the land who made such excavation will be responsible for any damage which may ensue to any member of the public who, while lawfully using the road, meets with an accident in such excavation, even though the latter may accidentally or excusably and without any contributory negligence have gone off the road for a short distance at the time of the accident.[17]

[12] G. 3 : 33 : 8; Vinnius, Inst., 4 : 3 : 8; V. D. L., p. 253.

[13] *Fleming* v. *Rietfontein Deep G. M. Co.*, (1905) T. S. 116; Voet, 9 : 2 : 18; Voet's Beginselen des Rechts, 4 : 3 : 6.

[14] See vol. ii., p. 98.

[15] *Clingen* v. *Ross*, 16 S. C. 152.

[16] Voet, 9 : 2 : 18.

[17] *Clingen* v. *Ross*, 16 S. C. 158; *Marais* v. *Eloff*, Hertzog, 141; *Fleming* v. *Rietfontein Deep G. M. Co.*,

The true test of liability in such a case is whether or not the harm complained of is such as a reasonable man should have foreseen as likely to happen from the excavation, under the circumstances.[18]

The rule just laid down will apply even where the road in question is not a public road, but one which, by the sufferance and permission of the owner of the ground, the public have been allowed to use at their pleasure, at any rate to this extent, that the owner of the ground will be liable for damages, if, without any previous warning and without taking the necessary precautions, he makes an excavation on such ground or stretches a wire across it and causes injury to an innocent person.[19] The liability of an owner of land will vary according as the injured person is on his ground as a matter of right or according as he is there merely for his own benefit and by the permission of the owner. In the former case a higher degree of care is expected than in the latter. His duty to a person who is there as a matter of right or for the benefit of the owner himself, is to take all reasonable care to protect him from any danger due to the condition of the property; and his duty to a person who is there merely for his own benefit but with the owner's permission, is merely to see that there are no hidden dangers connected with the property, of which such person may be unaware. In the latter case he will be under no duty to protect such person from any danger which is clear and apparent.[20] A landowner will even be liable to

(1905) T. S. 117; *East London Municipality* v. *Murray*, 9 E. D. C. 55.

[18] *Newman* v. *East London Municipality*, 12 S. C. 74. Conf. *Walters* v. *Lucas*, 7 S. C. 153; *Skinner* v. *Johannesburg Turf Club*, (1907) T. S. 858.

[19] *Wright* v. *Paterson*, 5 Searle, 33 and 5 E. D. C. 393; *Marais* v. *Eloff*, Hertzog, 138. See also *Transvaal Law* 9, 1893, Art. 11.

[20] *Skinner* v. *Johannesburg Turf Club*, (1907) T. S. 858.

a person who, whilst lawfully on his ground, is injured by the disrepair or unsafe condition of his premises. Thus, where owing to the negligence of the Public Works Department in failing to maintain the ceiling of a post-office in a proper state of repair, part of the ceiling fell upon and injured the plaintiff, a lessee of a postal letter-box, whilst attending to his box, the Government was held liable.[21] It would be different where a person deliberately trespasses on the ground of another and falls into a well or other excavation without any negligence on the part of the owner of the ground.[22]

The test, in fact, as to the liability or otherwise of a person who makes an excavation or does some other dangerous work in the neighbourhood of a road and causes injury to persons using the road, is whether or not a reasonable, careful man would and ought to have foreseen that an accident was likely to happen, and to have recognized that there would be danger to passers-by. In that case it would be his duty either to take proper precautions to guard against the danger or to abstain from doing the work. This is a question the decision of which will depend upon the particular circumstances of each case, of which the distance from the road will be the most important, though not necessarily the decisive one.[23]

Perhaps this will be the most appropriate place to mention a peculiar enactment of the Roman law, intended for the safety and protection of public streets and other thoroughfares, which would appear still to

[21] *Liddell* v. *Transvaal Government*, (1906) T. S. 863.

[22] *Wright* v. *Paterson*, 5 Searle, 32 and 5 E. D. C. 391. See also *Langlaagte Estate Gold Mining Co.* v. *Malan*, 1 Off. Rep. 37; *Skinner* v. *Johannesburg Turf Club*, (1907) T. S. 860.

[23] *Fleming* v. *Rietfontein Deep Gold Mining Co.*, (1905) T. S. 117.

be in force. We refer to the decree of the prætor with respect to things thrown or poured down from houses or apartments into a place used as a public or private thoroughfare (*de dejectis et effusis*),[24] and things which, having been placed on or suspended from the roof or any other projection of a house over such thoroughfare, fall down into the same.[25] For any damage caused by anything so thrown, poured or falling down, the occupier of the house or apartment, from which it came or fell, will be liable, whether he was himself the cause of its being so thrown, poured, placed or suspended or not, and whether he is the owner of such house or merely a tenant or gratuitous occupier.[26] At the same time the person who was the actual cause of the accident will also be liable;[27] and the occupier, if compelled to pay, will have his recourse against him.[28]

Where a house is occupied by several persons in divided shares, only the person from whose portion the stuff causing the damage came will be liable; but, if in undivided shares, each occupier will be liable *in solidum* for such damage, but, one paying, the others will be absolved, though they will be liable to contribute their shares to the one who has actually paid.[29]

To revert to dangerous operations, we may add that the degree of precaution required in carrying out any particular operation will depend also upon the degree of danger attaching to the same. In the case of blasting, for instance, mere ordinary precautions, especially in the vicinity of places frequented by the public, will not be sufficient. Where blasting is carried

[24] Voet, 9 : 3 : 1 and 5.
[25] Voet, 9 : 3 : 6.
[26] Voet, 9 : 3 : 1, 3 and 6; G. 3 : 38 : 3-6; V. D. K., Th. 810; Schorer, Note 384; V. L., vol. 2, p. 322.
[27] Voet, 9 : 3 : 1 and 6.
[28] Voet, 9 : 3 : 7.
[29] Voet, 9 : 3 : 1.

on in a town, there must not only be ordinary caution, but even most extraordinary care and the exercise of very superior skill indeed, and where there is the slightest want of most diligent care properly exercised and any accident happens which causes damage, the person responsible for the blasting will be liable.[30]

Similar rules would apply to the case of a steam engine which is being used in a place of public resort.[31]

As regards railway companies, even though no express duty may be imposed upon them by the statutes under which they are constituted, it may be laid down that, inasmuch as a locomotive is a machine the use of which may under certain circumstances involve danger to the public, they are bound to take every precaution to guard the public against such danger, and, if these precautions are omitted, they will be liable.[32] On the other hand, railways are mechanical appliances, the use of which in the interests of the public is sanctioned by legislative enactment, and consequently, where they cannot be used without causing some injury or inconvenience to private individuals, no action based upon such injury or inconvenience will lie, unless it can be shown that there has been some negligence on the part of the company, some omission to use the necessary appliances for avoiding or, at any rate, minimizing as far as possible any injury or inconvenience.[33] Thus, where it was proved that a locomotive had been duly fitted with

[30] *Elmer* v. *Warren*, 5 E. D. C. 389. See also *Leo*, *Kennedy and Murray* v. *Ramsbottom*, 1 Buch. App. C. 40, and *Goode and Smith* v. *Hall*, 1 H. C. 530.

[31] *Clair* v. *Port Elizabeth Harbour Board*, 5 E. D. C. 311.

[32] *Leonard* v. *Commissioner of Public Works*, (1907) E. D. C. 152.

[33] *Tobiansky* v. *Johannesburg Town Council*, (1907) T. S. 141.

every appliance required for preventing sparks from escaping and causing damage, but as a matter of fact sparks did escape and set fire to some long grass which had been left inside the railway fence, the Company was held guilty of negligence in leaving grass, which was in such an inflammable condition, so close to the line, and consequently liable to make compensation to a landowner where pasturage had been damaged by such fire.[34]

Railway companies are also bound to exercise due care when trains are passing a level crossing or other spot where danger may reasonably be anticipated, and will be liable in damages for any injury to person or property resulting from their failing to do so, the degree of diligence required varying according to the circumstances.[35]

Similar rules apply to tramway companies. Consequently a tramway company has been held liable for damage caused by one of its trams running over a small child, where it appeared that the driver might by exercising due care have avoided the accident. The negligence of parents who allow a small child to run unattended in the streets, does not remove the liability of a company for the consequences of its own or its servants' negligence, in case such child is run over owing to such negligence.[36]

The fact of a tramcar having passed within eighteen inches of the nearest of a team of oxen at the rate of six or seven miles an hour will not by itself amount to

[34] *Lamb* v. *Colonial Government*, 14 S. C. 103.

[35] *Metropolitan and Suburban Railway Co.* v. *De Villiers*, 10 S. C. 211; *Nel* v. *N. S. A. Railway Co.*, 2 Off. Rep. 165; *Liquidator of the Cape Central Railway* v. *Nothling*, 8 S. C. 25.

[36] *Johannesburg City and Suburban Tramway Co.* v. *Doyle*, 1 Off. Rep. 205.

negligence; but it will amount to negligence, if the driver of such car, when approaching such team, saw restiveness amongst the oxen and yet proceeded on his way without stopping.[37]

CHAPTER VII.

SOME EQUITABLE DEFENCES TO ACTIONS OF NEGLIGENCE.

Amongst equitable defences to actions based on negligence there are two which are of such importance that it will be well to consider them separately, namely, the defence of contributory negligence and that which is based on the legal maxim, *volunti non fit injuria.*

The first of these defences is based upon the allegation that the defendant has himself been guilty of contributory negligence of such a nature that he cannot be allowed to recover, upon the principle that no one can recover damages for an injury which he has brought upon himself. The difficulty, however, in every case is to decide as to when a person is to be considered as having brought an injury on himself. He will, on the one hand, clearly have done so whenever he could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequences of the defendant's negligence. On the other hand, he cannot be considered as having brought the injury upon himself where, even though he has by his negligence contributed to the accident, yet the defendant could in the result by the exercise of

[37] *Nangle* v. *East London Municipality*, 18 S. A. L. J. 57.

ordinary care and diligence have avoided the mischief which happened.[1]

The law with respect to contributory negligence was very concisely laid down by Lord Penzance in the case of *Radley* v. *London and North-Western Railway Co.*,[2] and has been adopted by our Courts in several cases as being in agreement with the principles of Roman-Dutch law. The following propositions were laid down in that case :—"The first proposition is a general one, to this effect, that plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence would not excuse him."

The true ground, in fact, of the rule which makes contributory negligence a bar to the plaintiff's right to recover is that such negligence was the proximate cause of the injury complained of. If the plaintiff can show that, although he has himself been negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff will be entitled to recover.[3] The test to be applied in every case, therefore, is what was the

[1] *Johannesburg Municipality* v. *Shepherd and Barker*, (1906) T. S. 984.

[2] *Radley* v. *London and North-Western Railway Co.*, 1 App. C. 759.

[3] *The Bernina*, 12 Probate Div. 89.

proximate or decisive cause of the accident—what was the last act which brought it about?[4]

The rules here laid down have been derived from the decisions of the English Courts of Law on the subject, our own common law authorities upon the subject being but scanty; but they have been adopted by our South African Courts, and applied in a number of cases. As soon, therefore, as, in any action based on negligence, negligence on the part of the defendant has been established, the burden of proof will be thrown on to the defendant, to show in the first place that the plaintiff himself has been guilty of negligence which contributed to the accident causing the injury complained of,[5] and in the second place that the defendant could not by the exercise of reasonable care and diligence have avoided the accident.[6]

The doctrine of contributory negligence does not, however, apply to a child of tender years. In order to enable a defendant to succeed in such a case, he will have to show that the injury was entirely due to the plaintiff's own negligence. But the applicability of the doctrine will depend upon the particular circumstances of each case, and also upon the age and intelligence of the child.[7]

A person may also avoid liability for negligence as regards particular persons by contracting himself

[4] *Johannesburg Municipality* v. *Shepherd and Barker*, (1906) T. S. 984, 990.

[5] *De Kock* v. *Town Council of Cape Town*, 4 S. C. 460; *Hutton* v. *Black Reef Gold Mining Co.*, 7 S. C. 77; *Hambly* v. *Socker Brothers*, 10 S. C. 228; *Weddovitch* v. *Donald Currie & Co.*, 6 E. D. C. 177; *Apollis* v. *Jarom*, 12 E. D. C. 187; *Kay* v. *Union-Castle Mail Packet Co.*, 15 E. D. C. 26; *Botes* v. *Netherlands South African Railway Co.*, 2 Off. Rep. 136; *Netherlands South African Railway Co.* v. *Van Rooyen*, 3 Off. Rep. 103; *Marais* v. *Eloff*, Hertzog, 142–143; *Boughey* v. *Bredell*, (1904) T. S. 394.

[6] *Hunter* v. *Cape Town Tramways Co.*, 17 S. C. 82; *Priestly* v. *Dumeyer*, 15 S. C. 393.

[7] *Eagleson* v. *Argus Printing and Publishing Co.*, 1 Off. Rep. 264 *et seqq.*

out of the same. Thus an employer may, by special agreement with those in his employ, limit his liability for negligence as regards them, at any rate in so far as such agreement is not opposed to public policy. This rule is based upon the maxim of our law *volenti non fit injuria*; that is to say, that a man who agrees to suffer an injury has, as a general rule, no right to complain if such injury actually occurs. In order, however, to render the maxim applicable it must be clearly shown that the employee was fully aware of the risk he was undertaking, that he realized the danger, and voluntarily took it upon himself. The essential elements required to make such an agreement binding are knowledge, appreciation, and consent; but knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent.[8] When all those three elements are present—that is to say, where a person knowing and realizing a danger voluntarily agrees to undergo it and to take the risk of it upon himself, he will have only himself to thank for the consequences.

All three essentials were held to be present in the case of *Spires* v. *Scheepers*,[9] where the plaintiff, a brick-maker, having express notice that, if he came on to the defendant's farm, he would be liable to be attacked by one of defendant's ostriches, and was consequently warned to take certain precautions, had deliberately taken the risk upon himself and entered into an agreement with the defendant to do some work on his farm, the defendant was held not liable for injuries subsequently inflicted upon the plaintiff by the said ostrich.

[8] *Waring and Gillow* v. *Sherborne*, (1904) T. S. 344; *Boughey* v. *Bredell*, *Ibid.* 397; *Morrison* v. *Angelo Deep Gold Mines*, (1905) T. S. 775.

[9] *Spires* v. *Scheepers*, 3 E. D. C. 178.

A person also who had undertaken employment as an attendant upon lunatics in an asylum was held not entitled to claim damages for an assault committed upon him by one of the lunatics, in the absence of evidence that the lunatic in question was a dangerous lunatic and that there had been negligence on the part of the asylum authorities in failing to warn the plaintiff as to his dangerous character.[10]

CHAPTER VIII.

WRONGS TO HONOUR, DIGNITY, AND REPUTATION.

Having thus far dealt with wrongs to the person and to property, we proceed now to those wrongs which have reference to the honour, dignity, and reputation of a person (called *injuria* in Latin and *hoon* in Dutch), any one of which will entitle the person injured thereby to an action of compensation in damages, corresponding to the *actio injuriarum* of the Roman law.[1]

Such wrongs may be inflicted in an infinite number of ways, which may be classified in the first place under two heads—namely, those which are inflicted verbally and those which are committed by act or deed.[2]

Verbal injuries, again, may be committed either by spoken word or what is in English law called *slander*, or in writing or printing or what is in English law

[10] *McMorrow* v. *Colonial Government*, 20 S. C. 626.

[1] Voet's Beginselen des Rechts, 4 : 4 : 1; V. D. L., p. 250.

[2] V. L., vol. 2, p. 289; V. D. L., p. 250.

called *libel*. Both of these classes are, however, under our law included under one head—namely, *defamation*.[3]

Defamation is in itself so large and important a subject that it deserves, and indeed requires, to be treated separately by itself, and consequently will be left to a later portion of this work.

Proceeding to other wrongs to the honour, dignity, and reputation, they may be divided (1) into those which affect the person and dignity alone and (2) those which affect as well the person and dignity as the liberty, honour, and reputation of the party injured. The former of these two classes we have already sufficiently considered above when treating of assault,[4] and it is not therefore necessary to repeat what was there said.

Of wrongs in which the liberty of the subject is involved some are inflicted without, or in abuse or excess of, legal or judicial process, whilst others are inflicted under the sanction of legal process unduly or improperly obtained or instituted.[5] Different principles will apply to these two classes of cases. In the former the mere absence of legal or judicial process or the mere exceeding of the powers conferred by the same will in itself be an illegality which will entitle the person affected or injured thereby to compensation in damages.[6] In the latter class the party setting the law in motion will in the first instance be protected by the legal or judicial process under which he has acted, until it be shown that, in obtaining such process, he acted maliciously and without reasonable and probable cause.[7]

[3] V. L., vol. 2, p. 299.
[4] See p. 22, above. See also V. L., vol. 2, p. 300, note *b*.
[5] *Hart* v. *Cohen*, 16 S. C. 268.
[6] Voet, 47 : 10 : 7.
[7] *Hart* v. *Cohen*, 16 S. C. 368; Voet, 47 : 10 : 7.

The former class will embrace, amongst other things, false imprisonment, whether civil or criminal, and the execution of writs against the goods of persons other than those against whom they were granted,[8] and of the latter class malicious prosecution is the most important.

CHAPTER IX.

FALSE IMPRISONMENT.

False imprisonment is the wrongful act of imprisoning, or restraining the liberty of, any one without legal warrant or writ or other legal authority or jurisdiction, for which an action of damages will lie.

It is essential for the purposes of this action that the illegal arrest or detention complained of shall have been made by, or at the instance of, the defendant and not merely upon information given by him. Thus, where it appeared that the defendant did not actually give the plaintiff into custody but merely stated the facts of the case fairly to a police constable, leaving him to act on his own responsibility, the defendant was held not liable.[1]

A claim based upon false imprisonment merely will be completely met by the production of a writ or warrant duly issued; but in order to justify an arrest made under a writ or warrant it is essential to show (1) that such writ or warrant is in due legal form and issued by an official having jurisdiction in that behalf; (2) that it was issued with respect to a matter in which

[8] *Hart* v. *Cohen*, 16 S. C. 368; Voet, 47 : 10 : 7.
[1] *Cohen* v. *Benjamin*, 4 S. C. 102.

the issue of a writ or warrant is legally justifiable; and (3) that it was issued upon sworn information laid *bonâ fide* and setting forth all the facts which might have influenced the official issuing the same either to grant or withhold his writ or warrant. We proceed to consider these three essentials separately.

(1) If the writ or warrant is made out and issued in due form of law by a duly qualified official, there will, in the absence of other invalidating circumstances, which will be considered further on, be no false imprisonment.[2] But where a writ of arrest has been subsequently set aside, the matter will be reduced, as regards the person who obtained its issue, to the same position as if there had from the beginning been no writ at all and an action of false imprisonment will lie against the person who obtained it, though the Sheriff or other officer, who executed the writ, will be protected thereby.[3]

As regards the persons authorized to issue warrants of apprehension in criminal matters, it may be stated that such warrants may be issued by any judge of the Supreme Court or other superior Court and by any Resident Magistrate or Justice of the Peace.[4] In the case of Justices of the Peace their authority is limited to those cases in which an enquiry before a Justice of the Peace is by law authorized, and it cannot be extended to offences in which summary jurisdiction is given to Resident Magistrates and Special Justices of the Peace, but not to ordinary Justices of the Peace.[5]

A civil writ of arrest can only be issued by the Registrar of the Supreme or other superior Court,

[2] *Shaskolsky* v. *Haupt*, 23 S. C. 232; *Sibaru Dante* v. *Barr*, 8 E. D. C. 101.

[3] *Pullinger* v. *Harsant*, 2 H. C. 111; *Majiet* v. *Zuckerman and Carroll*, 24 S. C. 608.

[4] Ord. 40, 1828, sec. 24.

[5] *Van Wyk* v. *Viljoen*, 4 S. C. 80.

and must comply with the provisions of the 8th Rule of Court.

Where a warrant has been issued by an official who has no authority to issue the same, it will not only not protect the person at whose instance it was granted, but will make the official himself liable to an action of false imprisonment.[6]

(2) The crime or offence, in respect of which the charge is made, must be one, for which the issue of a warrant of apprehension in the first instance, as contradistinguished from a summons to appear before a magistrate or other judicial functionary having jurisdiction, is legally justifiable. Though, for instance, magistrates are authorized under Ord. 40, 1828, sec. 24, and Ord. 73, 1830, sec. 9, to issue warrants for the apprehension of persons charged with criminal offences, this will not justify them in exercising this power with regard to offences which clearly appear to be proper for a court of summary jurisdiction.[7] In such a case, the proper course is first to issue a summons, recourse being had to a warrant of apprehension only after the accused has failed to appear to answer to the summons.[8]

(3) A warrant of apprehension can only be issued on a sworn information,[9] but the existence of a warrant will not protect the person obtaining it unless the sworn information upon which it was obtained contained a full statement of all the material facts. Thus, when an arrest had been made under a writ indeed, but upon a writ issued upon an affidavit made by the defendant, in which he suppressed material facts

[6] *Van Wyk* v. *Viljoen*, 4 S. C. 80.

[7] *Willemse and others* v. *Lategan*, 5 Cape Times 350; *Rademeyer* v. *Van der Merwe*, 12 S. C. 450.

[8] *Ibid.* But see *Coetzee* v. *Nimmo and others*, 18 E. D. C. 33.

[9] 1 Buch. 140.

which, if they had been disclosed to the Registrar, would have influenced him to withhold the writ, the Court came to the conclusion that it might treat the writ as one that had never been issued, and the arrest as having been made without any writ and upon the defendant's individual authority alone, and held the defendant liable in damages.[10]

The duty of a police officer in the execution of a warrant of arrest is to tell the person to be arrested who he himself is, to produce and exhibit his warrant, and to call upon such person to submit himself to the same.[11]

Any warrant or writ must be executed with due consideration for the rights and feelings of the persons affected thereby, and any excess in this respect will entitle the latter to damages. Thus, where it was sought to justify an arrest or detention on the ground that it had been made in the course of the execution of a search warrant, the Court, having found that the keeping of the plaintiff in custody was unnecessary, and not required for the purposes of the search, held that a case of false imprisonment had been established.[12]

An arrest made under a warrant, but at a time when the person making the arrest has not the writ of arrest in his possession, is an illegal arrest as against the person making it, and will afford ground for an action of false imprisonment.[13]

As regards persons who are authorized to make criminal arrests without a warrant, it may be stated that such arrests may be made or ordered by any judge of the Supreme Court, Resident Magistrate, or

[10] *Gropp* v. *Garlick*, 4 S. C. 101, Note.

[11] *Jacobs* v. *Evans*, 2 Buch. 29.

[12] *Rigg* v. *Roper and Jackson*, 4 S. C. 117.

[13] *Rigg* v. *Roper and Jackson*, 4 S. C. 114. See also *Silberbauer* v. *Ruthven*, 1 Buch. 100.

Justice of the Peace who has knowledge of any crime or breach of the peace by seeing the same committed.[14] Arrests may also be made without warrant by the sheriff or any of his deputies, and by all field-cornets, constables, and police officers in cases of crime or breaches of the peace committed in their presence; and these officers will also have the right to arrest without a warrant any person whom they shall have reasonable grounds to suspect of having committed one of the more serious crimes, such as murder, culpable homicide, rape, robbery, or assault with intent to commit any of these crimes, or in which a dangerous wound is given, arson, housebreaking with intent to commit any crime, or theft of any cattle, sheep, or goat, or any other crime of an equal degree of guilt with any of the aforementioned crimes.[15]

A private person also has authority to arrest without a warrant in the case of any of the above serious crimes, if committed or attempted to be committed in his presence, or if he has knowledge that any such crime has been recently committed.[16] He will also be entitled to arrest any person upon reasonable suspicion of having committed any of the above serious crimes, but in that case he will do so at his own peril, in case it should turn out that the party arrested or attempted to be arrested is innocent.[17]

The plaintiff, in a case of false imprisonment, will be entitled to substantial damages for the wrong and indignity done to him, even without the necessity of proving special damage. A Court of Appeal may

[14] Ord. 40, 1828, sec. 22; Ord. 73, 1830, sec. 11.

[15] Ord. 40, 1828, sec. 23; Ord. 73, 1830, sec. 12; *Jesson* v. *Jonas*, 10 S. C. 202; *Queen* v. *Botha*, 13 S. C. 297; *Coetzee* v. *Nimmo and others*, 18 E. D. C. 33.

[16] Ord. 73, 1830, sec. 14.

[17] Ord. 73, 1830, sec. 15.

consequently increase the amount of damages awarded by the Court of first instance, where damages clearly insufficient have been granted.[18]

CHAPTER X.

MALICIOUS PROSECUTION.

MALICIOUS prosecution is merely one of a large class of malicious wrongs, that is to say, of wrongs which are committed either with express malice or with such a reckless disregard of the rights of others as to amount to malice in law.[1]

Malicious wrongs may be inflicted either by way of legal proceedings or without legal proceedings. Amongst the latter, defamation is the most common; but Voet[2] enumerates a number of others, and amongst them the following, namely, maliciously preventing a man from disposing of his own property, or from using a public or private road to which he is entitled, maliciously interfering with or preventing the publication of another's banns, and immodestly soliciting a respectable woman, whether virgin or matron, for immoral purposes, all of which are included under the term *injuria* proper. We have ourselves already treated of some of these under the heading of assault and of wilful trespass on another man's land or in his dwelling-house. A curious case of the kind occurred in the Transvaal in 1885, in which an architect, whose

[18] *Fransman and another* v. *Kium*, 3 S. C. 198.

[1] V. L., C. F., part 1 : 5 : 25 : 1.

[2] Voet, 47 : 10 : 7 and 13. See also Voet's Beginselen des Rechts, 4 : 4 : 2. See also *Johnston* v. *Byrne and Lamport*, 1 Searle, 157.

name had, with the knowledge and consent of the building owner, been placed upon a corner-stone, recovered damages from a defendant who had *malo animo* removed such name from the inscription.[3]

With respect to malicious legal proceedings, whether civil or criminal, it may be laid down generally that when a person sets the law in motion and damage to another person ensues therefrom, he will be liable in damages if it can be shown that in doing so he acted maliciously and without reasonable or probable cause.[4]

Malicious legal proceedings may be either civil or criminal, that is to say, they may consist either in criminal arrest or prosecution, or in civil arrest under the 8th Rule of Court or other civil proceedings.

Malicious prosecution consists in maliciously and without reasonable or probable cause laying a false criminal charge against any one, which has led to the prosecution of the latter, and has thus injured him in person, property or reputation.

The action for malicious prosecution was not in frequent use in the Netherlands, owing no doubt to the complete control which the public prosecutor had over the whole of the proceedings in criminal matters, the part taken by the person laying any complaint being confined to a bare statement of the facts upon which such complaint was based.[5] Our modern action of malicious prosecution is almost entirely derived from the principles and practice in force in English Courts of law, though at the same time it is in entire

[3] *Claridge* v. *Francken*, 2 S. A. R. 66.

[4] *Beukes* v. *Steyn*, 7 Buch. 24.

[5] Amongst the Roman-Dutch authorities referring to the subject, reference may be had to Voet, 47 : 10 : 7 and 9.

accordance with the general principles of Roman-Dutch law, applicable to wrongs and injuries.[6]

It is not, however, the policy of our law to encourage these actions, it being considered to be to the public interest that offenders should be punished, and that it would, therefore, not be wise to discourage private individuals from assisting the authorities by giving information of crimes or offences which they have reasonable ground for thinking have been committed.[7] The Courts have therefore laid down certain essential requisites for this form of action, in order to keep a check upon the indiscriminate institution of such actions, and the principal of these are that the plaintiff must allege in his declaration,[8] and must be prepared to prove: (1) that the criminal proceedings were set in motion by the defendant; (2) that the criminal charge laid against the defendant was false in fact, and has been decided to be so by a competent Court or by the public prosecutor, whose duty it is to adjudicate or decide upon the matter;[9] and that the prosecution was instituted, (3) maliciously, and (4) without reasonable cause.[10]

The first thing then to be proved is that the criminal proceedings complained of were set in motion by the defendant.[11] This is a matter of fact which will have to be established by evidence in the ordinary way. Where the defence set up was that the arrest complained of was the sole act of a Justice of the Peace with which the defendant had nothing to do, the Court

[6] *Lemue* v. *Zwartbooi*, 13 S. C. 406; *Hart* v. *Cohen*, 16 S. C. 368.

[7] *Van Noorden* v. *Wiese*, 2 S. C. 47 and 54.

[8] *Rooikop* v. *Bester*, 10 Cape Times, 763; *Beukes* v. *Steyn*, 7 Buch. 24.

[9] *Lemue* v. *Zwartbooi*, 13 S. C. 403.

[10] *Rooikop* v. *Bester*, 10 Cape Times, 763.

[11] *Sheppy* v. *Barry Brothers*, 23 S. C. 341.

held that the fact that the defendant was present at the arrest, that he made suggestions as to searching the plaintiff, that he provided a room for the temporary detention of the plaintiff, and that his servant afterwards took charge of the plaintiff whilst in custody, afforded sufficient evidence of defendant's participation in the arrest to justify an action of damages for malicious arrest.[12] It will not, however, be enough to show that the defendant gave evidence as a witness against the plaintiff at a preliminary examination or at a trial, or that, upon being questioned by the police authorities, he gave them certain information. It is essential that he shall himself have set the criminal law in motion.[13]

As regards the second essential, it is not necessary that the plaintiff shall have actually undergone a trial and been acquitted; it will be sufficient for the purposes of this action if the public prosecutor, that is to say, the Attorney-General or Solicitor-General, or Crown Prosecutor, has declined to prosecute.[14]

As regards the third and fourth essentials, it is absolutely indispensable for the purposes of this action that the prosecution shall have been instituted both maliciously and without reasonable and probable cause. If one or other of these elements is lacking, the plaintiff will be entitled to no relief.[15] Consequently judgment will be refused, on the one hand, where there was reasonable and probable cause for the prosecution,

[12] *Moreno* v. *Milner*, 1 E. D. C. 147. See also *Anderson* v. *Sunderland*, 1 H. C. 435.

[13] *Michau* v. *Westerman*, 17 S. C. 432.

[14] *Lemue* v. *Zwartbooi*, 13 S. C. 407.

[15] *Martha* v. *Allen*, 1 Buch. App. C. 140; *Jesson* v. *Jonas*, 10 S. C. 202; *Moetsi* v. *September*, 13 S. C. 337; *Lemue* v. *Zwartbooi*, *Ibid.* 407; *Carne* v. *Howe*, 15 S. C. 232; *Van Litzenbery* v. *Louw and De Beer*, 16 S. C. 283; *Nourse* v. *Farmers' Co-operation Co.*, 19 E. D. C. 312, 316.

though the defendant may have been actuated by express malice in instituting the same;[16] and, on the other, where reasonable and probable cause are entirely absent, but the plaintiff has been unable to prove malice.[17]

As regards reasonable and probable cause, it should be added, that these elements must be present not only at the beginning of a prosecution, but throughout the prosecution up to its very termination. If, therefore, facts come to the knowledge of the complainant or person instituting the criminal proceedings at any time during their continuance, showing that no crime or offence has actually been committed by the accused person, he will be bound to give notice of such facts to the authorities, and to stop the prosecution, and, if he fails to do so, he will be liable in damages.[18]

The term "malice" in the case of malicious prosecution or malicious civil proceedings is not confined to actual personal malice, that is to say, to spite or hatred against or a wish to annoy the plaintiff, but may include the case where the defendant has been actuated by any other improper or indirect motive.[19]

In order to establish "reasonable and probable cause," it will be necessary for the defendant to show not merely that he had an honest belief in the guilt of the plaintiff, but also that his belief was such as would have been entertained by any person of ordinary discretion and prudence. If his belief and consequent conduct were such as would not have been entertained

[16] *De Kock* v. *Uys*, 8 Buch. 184; *Moreno* v. *Milner*, 1 E. D. C. 146; *Pearse* v. *Fleischer*, 4 E. D. C. 298; *Troutman and others* v. *Davis*, 13 E. D. C. 171.

[17] *Rigg* v. *Roper and Jackson*, 4 S. C. 116: *Beukes* v. *Steyn*, 7 Buch. 22. See also *Booyser* v. *Geyser*, 1 S. A. R. 200.

[18] *Van Noorden* v. *Wiese*, 2 S. C. 54.

[19] *Mitchell* v. *Jenkins*, 5 B. & Ad. 595; *Spiegel* v. *Miller*, 1 S. C. 273.

by a person exercising ordinary care and prudence, he will be held liable.[20]

The question as to whether malice and want of reasonable and probable cause were present in any particular case is one of fact, which will have to be decided by the Court sitting as a jury in accordance with all the circumstances of the case. The decision may depend, amongst other things, upon communications which passed prior to the prosecution between the defendant and his attorney, for, when a man consults his legal adviser in order to ascertain his legal position, that fact, coupled with the advice actually given, may have an important bearing on the question of malice, and, if his subsequent action was in pursuance of the advice obtained by him, upon the queston of the existence or otherwise of reasonable and probable cause. It has, therefore, been held that, where no question of professional privilege arises, evidence as to what passed between the defendant and his attorney is admissible as bearing on the question of reasonable and probable cause.[21]

Malice may be fairly inferred from the mere fact of an arrest having been made without reasonable and probable cause, provided the other circumstances, under which the arrest was made, concur or at least are not inconsistent with such deduction, but it is not a necessary inference.[22] If a man acts in a grossly negligent and reckless manner, acting in the furtherance of his own interests without due regard to the rights of others, and careless as to whether he interferes with the liberty of another person or not, the natural

[20] *Van Noorden* v. *Wiese*, 2 S. C. 47, 54; *Fyne* v. *African Realty Trust*, (1906) E. D. C. 256.

[21] *Heiberg* v. *McWilliam, Kilroe and King*, (1905) T. S. 219.

[22] *Hart* v. *Cohen*, 16 S. C. 367; *Maserowitz* v. *Richmond*, (1905) T. S. 342.

inference is that he is influenced by improper motives, a fact which will in law be regarded as equivalent to malice.[23] Malice may be inferred also from the fact that the defendant obtained a writ of arrest upon an affidavit in which he omitted to state all the facts which might have influenced the Registrar in granting or withholding his writ;[24] or that, in order to bring pressure to bear upon the plaintiff, he had had him arrested criminally when the latter was only liable to him in a civil action, if at all.[25] On the other hand, where there was an unsettled account between the plaintiff and defendant, with items on both sides of the account, and the defendant, believing *bonâ fide* that a certain amount was due to him by the plaintiff, had the latter arrested for that amount, it was held that the defendant could not be regarded as having acted maliciously, upon its subsequently being found that a less sum was actually due by plaintiff; nor where he made such an arrest, acting *bonâ fide* under a wrong notion as to the law, and pursuant to legal advice obtained by him.[26]

Malice will have to be both averred in the declaration and established by evidence. It will not be enough merely to allege that the proceedings were wrongfully and unlawfully taken and contrived by the defendant who well knew that the plaintiff was not legally indebted or liable to him.[27] In other words, it will not be enough to prove mere absence of reasonable

[23] *Laubscher* v. *Vigors and Fryer*, 3 Buch. 104; *Spiegel* v. *Miller*, 1 S. C. 273; *Van der Vyver* v. *Deary*, 13 S. C. 435; *Kaplan* v. *Abrahamson*, 9 E. D. C. 99.

[24] *Van der Vyver* v. *Deary*, 13 S. C. 444; *Beck* v. *Hollard & Co.*, 1 S. A. R. 89.

[25] *Carne* v. *Howe*, 15 S. C. 232; *Freedman* v. *Kruger*, (1906) T. S. 817; *Fyne* v. *African Realty Trust*, (1906) E. D. C. 248; *Jackson* v. *Wolf*, 1 H. C. 502.

[26] Per Parke, J., in *Mitchell* v. *Jenkins*, 5 B. & Ad. 595.

[27] *Beukes* v. *Steyn*, 7 Buch. 24.

and probable cause; it is essential that in addition malice shall be established.[28]

Even where the Court is unable to come to the conclusion that there has been an absolute want of reasonable and probable cause or malice, it may at the same time show its sense of any high-handed, indiscreet, or other improper conduct on the part of the defendant, by making him pay his own costs.[29]

An action will lie not only for malicious prosecution, but also for malicious civil proceedings, the grounds of the action being similar in each case; namely, the institution of legal proceedings without reasonable and probable cause and maliciously.[30]

When legal proceedings have been taken in due legal form, they will be presumed to have been instituted *bonâ fide*, until the contrary be proved. If a person institutes such proceedings under the *bonâ fide* belief that his rights have been infringed, he commits no unlawful act, even though such proceedings may cause damage to the person against whom they are directed. The damage thus caused will be *damnum absque injuria*, unless it can be proved that the proceedings were instituted maliciously and without reasonable and probable cause.[31] Every man is at liberty, when he conceives his rights to have been invaded, to come to the Court and claim the protection of those rights by the process of the Court, and, if afterwards the Court should decide that these rights have no existence, the

[28] *Hart* v. *Cohen*, 16 S. C. 367.

[29] *Wolstenholme* v. *Boyes*, 8 Buch. 175 and 3 Roscoe, 50.

[30] *Spiegel* v. *Miller*, 1 S. C. 273; *Herron* v. *Torque Electrical Engineering Co. and others*, 22 S. C. 432; *Sharkolsky* v. *Haupt*, 23 S. C. 232; *Schreiber* v. *Paper*, (1906) E. D. C. 37. For other decisions on malicious civil proceedings see *Mitchell* v. *Jenkins*, 5 B. & Ad. 588; *Hart* v. *Cohen*, 16 S. C. 367; *Laubscher and Vigors* v. *Fryer*, 3 Buch. 104; *Van der Vyver* v. *Deary*, 13 S. C. 435; *Beck* v. *Hollard & Co.*, 1 S. A. R. 89; *Beukes* v. *Steyn*, 7 Buch. 24.

[31] *Beck* v. *Hollard & Co.*, 1 S. A. R. 91.

person, against whom the intervention of the Court has been obtained, will have no remedy, and any damage he may suffer by reason of such intervention of the Court will be *damnum absque injuria*,[32] it being considered that the abuse of the process of the Court is as a general rule sufficiently guarded against by the fear of having to bear the costs in case such proceedings are unsuccessful.[33]

The question of reasonable and probable cause would seem not to be so strictly interpreted in the case of civil proceedings as in that of malicious criminal proceedings.[34] The question to be decided in a civil matter is whether the defendant in putting the law in motion acted as a discreet and prudent man would have done.[35]

The term "malice" has the same meaning in civil as in criminal proceedings, and the decided cases bearing on the subject have been already considered above.[36]

CHAPTER XI.

DEFAMATION.

DEFAMATION is the publication of any injurious or defamatory communication with respect to another with the malicious intent of injuring him in his good name, fame, credit, or reputation, and of exposing him to the hatred, ridicule, or contempt of his fellow men.[1]

Such communication may be made by word of

[32] *Cohen, Goldschmidt & Co.* v. *Stanley and Tate*, 1 S. A. R. 137.
[33] *Beukes* v. *Steyn*, 7 Buch. 24.
[34] *Ibid.*
[35] *Spiegel* v. *Miller*, 1 S. C. 273.
[36] See p. 83, above.
[1] *White* v. *Pilkington*, 1 Searle, 119; Voet, 47 : 10 : 1; G. 3 : 36 : 1.

mouth, by writing, by printed matter in a newspaper, book, or other publication, by pictures, by conduct, or in any other way in which a defamatory meaning may be conveyed.[2] The seconder of a defamatory resolution at a public meeting, for instance, will make himself responsible for the contents of the resolution without having actually repeated them;[3] and an auctioneer may make himself liable for defamation by merely refusing a bid at a sale without reserve held by him.[4]

Spoken defamation is in legal phraseology called *slander*, and printed or written defamation is called *libel*, but the adjective *libellous* is used indiscriminately with respect to both kinds of defamation.

Under our common law, defamatory publications exposed the persons guilty of them to two forms of action at suit of the person defamed or injured, namely, (1) an action of damages for the injury done,[5] or the *amende profitable*, and (2) an action for an apology or *ad palinodiam*, or for the *amende honorable*, as it was called.[6] Both these actions might, however, be consolidated, and brought in one and the same action.[7]

In South Africa the action for an apology or for the *amende honorable* has somewhat fallen into disuse, owing to the fact that a judgment for an apology, unless voluntarily assented to by the defendant, could only be enforced by civil imprisonment, a form of procedure which the Courts are at all times very loth to adopt.[8] It will not, therefore, be necessary to refer

[2] Voet, 47 : 10 : 7 and 10; G. 3 : 36 : 2.

[3] *Meurant* v. *Raubenheimer*, 1 Buch. App. C. 91.

[4] *Municipality of Willowmore* v. *Matthews*, 8 S. C. 20.

[5] Voet, 47 : 10 : 13.

[6] Voet, 47 : 10 : 7; V. L., vol. 2, p. 300.

[7] Voet, 47 : 10 : 17.

[8] *Hare* v. *White*, 1 Roscoe, 247.

to it any further here, and we shall, therefore, confine our attention to the action of damages merely. It may be as well to add, however, that the fact that the defendant has apologized will at all times be a matter of great importance when the question of the amount of damages comes to be decided.

The essentials of the action for damages are: (1) that the defendant shall be capable of defamation; (2) that there shall have been publication; (3) that the publication shall have been made maliciously and with intent to injure (*animo injuriandi*); (4) that the words be defamatory; and (5) that the words were meant to apply to the plaintiff.

It will not be necessary for the plaintiff to prove, in the first instance, that the words are false. The law presumes defamatory words to be false, until the defendant under a plea of justification has led evidence to prove the truth of the words.[9]

In the same way, it will not be necessary, in the first instance, to prove special damage. If the words uttered or published are clearly defamatory on the face of them, the law will presume that damage has resulted from them as a natural consequence, and the Courts will give judgment for general damages,[10] not only as compensation for the damage which the law presumes to have resulted therefrom, but also for the insult (*contumelia*) suffered by the person defamed.[11] Our law in this respect does not draw any hard and fast line between general and special damages; and consequently it has been held that where a trader's credit is affected by a defamatory

[9] *Norden* v. *Oppenheim*, 3 Menzies, 53.

[10] *Boonzaaier* v. *Castens*, 1 Cape Times, 159.

[11] *Hart* v. *Robinson*, 12 E. D. C. 30; *Botha* v. *Pretoria Printing and Publishing Works*, (1906) T. S. 713.

libel, he will be entitled to general damages without the necessity of proving any.[12] But though proof of special damage may not be essential for the purposes of obtaining judgment, such damage may still be proved in aggravation of damages, provided it has been properly pleaded. It will be essential, however, in such a case to show that the damage in question is the direct result of the uttering or publication of the words complained of, and the damage must not be too remote.

As one of the essentials of defamation is that the publication must have been malicious, it follows that only persons who are capable of malice (*doli capaces*) can be guilty of defamation.[13] Children under seven years of age, for instance, are regarded in law as incapable of malice, even as they are incapable of crime,[14] and can therefore not be held liable for any defamatory matter published by them.[15] Children between seven and fourteen years of age, however, will be liable for defamatory communications made by them;[16] but whether this is only the case with the same limitations with which they are liable for crime, that is, provided they are proved to be capable of malice,[17] is not quite clear.[18]

Any natural person may be the victim of a slander or libel, and will be entitled to sue for damages for the same; but this is not true with respect to fictitious persons without certain limitations.

A natural person will be entitled to this right of action, though he may be incapable of understanding

[12] *Pickard* v. *S. A. Trade Protection Society and others*, 22 S. C. 97.

[13] Voet, 47 : 10 : 1.

[14] *Queen* v. *Lourie*, 9 S. C. 432; *Queen* v. *George and others*, 2 E. D. C. 392.

[15] Voet, 47 : 10 : 1.

[16] *Ibid.*

[17] *Queen* v. *Lourie*, 9 S. C. 432; *Queen* v. *Albert*, 12 S. C. 272; *Queen* v. *Slinger and Klaas*, 4 E. D. C. 279; Voet, 47 : 10 : 1.

[18] Voet, 47 : 10 : 1.

that anything discreditable has been done to him, as is the case with children and persons of unsound mind.[19]

A corporation, on the other hand, will only be entitled to sue when the defamation consists in the imputing to it of conduct, of which as a corporation it can be capable, but not of acts which it cannot possibly perform. Thus it has been held that a non-trading corporation cannot be libelled in its corporate capacity by the imputation to it of an act of mind or intention, such as charging it with being corrupt. In the case of a trading company, again, a libel, to be actionable, will require to be of a nature capable of injuring such a company in the conduct of its business or in some way which may affect its business, and special damage, it would seem, will have to be proved.[20]

In the case of a libel on a newspaper different principles would apparently apply from those which would apply in the case of a libel on an individual. In such a case it is not a question of character, but of business, and special damage will, therefore, have to be proved. Thus for one newspaper to reflect upon the system of reporting in use with another as being "nothing short of being scandalously one-sided, and which consists of either wholly suppressing or cruelly distorting, in the process of shortening, speeches of members who, for a variety of reasons, may be safely boycotted," has been held not to be actionable in the absence of proof of special damage, and considering at the same time the methods of parliamentary reporting in use amongst the newspapers of Cape Town

[19] Voet, 47 : 10 : 4.

[20] *Cape Times* v. *South African Newspaper Co.*, 23 S. C. 47 and 48.

at the time.[21] So also it has been held not actionable for one newspaper to write of another that "it consists mainly of cuttings from other newspapers" or to suggest that it is "run on petty or personal lines";[22] but, on the other hand, it was held by the High Court of the late South African Republic that for one newspaper to accuse another of being "a hired Rhodes organ" and "in the employ of Rhodes" and of "throwing its weight against the true interests of its country in favour of a foreign power" was actionable.[23]

By publication in the case of defamation is meant the communication or making known of the defamatory matter to some person other than the wrong-doer or defendant and the person defamed or plaintiff. If, for instance, the defendant merely writes a defamatory letter or other document, and keeps it by him without making use of it, or sends it to the plaintiff himself without showing it to any third party, no action will lie.[24] Where the letter has been sent to the plaintiff, it will make no difference in this respect if the letter is opened by a clerk of the plaintiff's, unless the defendant authorized the clerk to open it or was aware that he would open it in the ordinary course of business.[25] But where a defendant, upon receiving a letter of demand which asked for the withdrawal of, and an apology for, a letter written by him to plaintiff, approached a possible witness with the ostensible purpose of obtaining his evidence and quite

[21] *Cape Times* v. *W. A. Richards & Sons*, 18 S. C. 15.

[22] *Hay* v. *Robertson*, 9 E. D. C. 170.

[23] *Eugene Marais* v. *Volksstem Co.*, 3 Off. Rep. 66.

[24] *De Lettre* v. *Kiener*, 3 Menzies, 12; *Marais* v. *Smuts*, 3 Off. Rep. 158.

[25] *Hall* v. *Zietsman*, 16 S. C. 213. But see *Marais* v. *Smuts*, 3 Off. Rep. 158.

unnecessarily informed him of the contents of the letter, this was held to amount to publication.[26]

Where a libel has been published by the defendant abroad and has got into circulation in this colony, it will not be necessary to allege or to prove that the publication in this country was brought about by the defendant. Having originally published the libel, he will be held responsible for its spreading.[27]

By the term "malice" in the case of defamation is meant not necessarily any actual ill-will borne by the defendant to the plaintiff,[28] but merely the doing of a wrongful act without just cause or excuse.[29] The publication of defamatory matter is *primâ facie* wrongful, and therefore it will in the first instance be sufficient for a plaintiff to show that defamatory words have been spoken or otherwise published concerning himself, whereupon it will be presumed that they were maliciously published, until the contrary be proved or until circumstances sufficient in law to rebut the presumption have been established.[30] It will be important, however, for the plaintiff, whenever he can do so, to prove actual malice, as it will go in aggravation of damages.

The absence or presence of any *animus injuriandi* will have to be gathered from the circumstances of each case; but the falsehood of statements injurious to the character of the plaintiff, which have been

[26] *Hayter* v. *Lanham*, 8 E. D. C. 167.

[27] *MacDonald* v. *Dormer*, 2 S. A. R. 270.

[28] *Reynolds* v. *Ainsley*, (1904) T. S. 870.

[29] *White* v. *Pilkington*, 1 Searle, 119.

[30] *Norden* v. *Oppenheim*, 3 Menzies, 53; *Hill* v. *Curlewis and Brand*, *Ibid.* 514; *Botha* v. *Brink*, 8 Buch. 123 and 130; *Diepenaar* v. *Hauman*, 3 Roscoe 40; *White* v. *Pilkington*, 1 Searle, 107; *Scott* v. *Kretzman*, 15 E. D. C. 48; *Fick* v. *Watermeyer*, 4 Buch. 89 and 90; *Payne* v. *Sheffield*, 2 E. D. C. 166; *Ribbink* v. *Marais and Roos*, 4 S. A. R. 240; Voet, 47 : 10 : 20.

published by the defendant, will be sufficient in itself to prove *animus injuriandi*, unless the latter can prove that the words were made use of under special circumstances of privilege which are in law sufficient to negative the presumption of malice, and that, in publishing words not consistent with truth, he was actuated by some motive which is in law sufficient to excuse the error into which he has fallen.[31]

Whether the defamatory words were intended by the defendant to apply to the plaintiff is a question to be decided by the Court from the nature of the words themselves, and from all the circumstances of the case. The defendant will not be allowed to call witnesses to swear that they read the libel and did not see its application to the plaintiff,[32] nor will he be allowed to himself give evidence as to the person to whom he intended to refer. The words must be taken according to their ordinary meaning, and in the sense in which they would be understood by the general reader.[33]

As to what words are to be considered defamatory and actionable and which not, a distinction is drawn by the law of England between slander and libel. By that law all written words which expose a person to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbours, are defamatory.[34] This is not, however, the case with respect to spoken defamation or slander, unless the words (1) charge the plaintiff with the commission of a crime, (2) impute to him a contagious or infectious disease, tending to

[31] *Mackay* v. *Philip*, 1 Menzies, 463; *Moodie* v. *Fairbairn*, 3 Menzies, 18–19.

[32] *Horstock* v. *Boniface, Breda and Neethling*, 1 Menzies, 469.

[33] *McLoughlin* v. *Impey*, 5 Buch. 77; *Upington* v. *Saul Solomon & Co.*, *Ibid.* 280.

[34] Odgers, "Libel and Slander," 2nd Ed., p. 19.

exclude him from society, or (3) are spoken of him in the way of his office, profession, or trade, or unless (4) special damage has resulted from their use.[35]

This distinction is not recognized by our law, according to which both slander and libel would fall under the definition of *libel* given by the English law.[36] By our law all words, whether spoken or written, are regarded as defamatory and actionable, which have been uttered or published with the object of injuring a person in his good name, fair fame, credit, or reputation, or of exposing him to the enmity, ridicule, or contempt of his neighbours.[37]

To decide whether words are defamatory or not, their plain ordinary meaning is, of course, the first consideration; but the context in which, and the circumstances under which, and the tone, whether ironical or otherwise, in which they were spoken, must not be lost sight of.[38] For instance, to say that a certain individual is an "honest attorney" would as a general rule be perfectly harmless, but the words may be spoken under such circumstances and in such a tone of sarcasm as clearly to convey to his hearers that the person referred to is anything but an honest attorney. The language must, however, be capable of that construction. The mere fact that the persons actually present understood the words in a defamatory sense will not make them defamatory, unless they were reasonably justified in so understanding them.[39]

Voet lays it down that where the words complained

[35] Odgers, p. 53.

[36] *Steenberg* v. *Cooper*, 21 S. C. 495.

[37] *Hare* v. *White*, 1 Roscoe, 247; *Lewison* v. *Philips*, 3 Menzies, 37; *Vigors* v. *Campbell*, 1 Buch. 20; Voet, 47 : 10 : 8.

[38] *Pienaar* v. *Pretoria Printing Works and others*, (1906) T. S. 805; Voet, 47 : 10 : 8.

[39] *Rudd* v. *De Vos*, 9 S. C. 493.

of are ambiguous, the more innocent interpretation must be given to them.[40] But in *Sands* v. *Varkevisser*, words capable of an innocent meaning, though at the same time capable of a defamatory meaning, and which were so understood by those who heard them, were held to be actionable.[41]

On the other hand, it would appear that words which are in themselves defamatory, may be so softened down by the context or by the circumstances or by the manner in which they were uttered, as to cease to be actionable. But if in such a case the words, even when so softened down, are still defamatory, an action will lie.[42]

Where one passage in an article in a newspaper is complained of, the whole of the article must be read together, and not merely one isolated passage, in order to decide whether the words are libellous.[43]

Applying these rules to actual practice, the following spoken words have been held to be actionable:—

(1) To say of a person that he has stolen land, inasmuch as, though in law land cannot be stolen, the words imply that the person charged has acquired the land fraudulently.[44]

(2) Words charging a woman with unchastity.[45]

(3) The words, "You are the delinquent," though they may be innocent enough when spoken in the ordinary way, have been held to be actionable where

[40] Voet, 47 : 10 : 20.

[41] *Sands* v. *Varkevisser*, 2 Buch. App. C. 130. See also *K.* v. *T.*, 21 S. C. 177.

[42] *Steenberg* v. *Cooper*, 21 S. C. 495.

[43] *Irvine* v. *Impey & Co.*, Foord, 73; *Walter* v. *Powrie*, 7 Buch. 35 and Foord, 191.

[44] *Erasmus* v. *Pieterse*, 2 S. A. R. 225.

[45] *Sands* v. *Varkevisser*, 2 Buch. App. C. 130; *K.* v. *T.* 21 S. C. 177. See also *Howard* v. *Nuttall*, (1906) E. D. C. 285.

they were used in the course of some investigations into a charge of smuggling.[46]

(4) Calling a man "a liar"[47] or "a rogue and a liar"[48] or "a blackmailer."[49]

(5) Saying of an attorney in open court, "You talk of honesty! You are the last person to talk about honesty after what has occurred to-day," or calling an attorney "a pettifogger."[50]

(6) Saying of a plaintiff, "I do not like his mean tricks. I told him to go elsewhere with his dirty, mean tricks."[51]

(7) The words "You are no gentleman" will not necessarily be slanderous in every case, and have been held not to be so in the phrase, "You are no gentleman if you bring these prostitutes into the room," when addressed by a colonel in the army to a junior officer with reference to the introduction by the latter into a garrison ball of two young ladies, whose conduct might have been open to comment,—whatever might have been the case if the young ladies themselves had been the plaintiffs.[52]

(8) To say of a man in his private capacity, "He is not a respectable man," may or may not be libellous, but to make the same remark with respect to a person in his capacity as being the occupant of a position of trust, such as an auditor, has been held to be actionable, inasmuch as it imputes to him want of character and want of fitness for his office.[53]

As regards written or printed words, the following have been held to be actionable :—

[46] *Strasburger* v. *Orpen*, 15 S. C. 270.
[47] *Innes* v. *Proctor*, 19 E. D. C. 56.
[48] *Wilhelm* v. *Beamish*, 11 S. C. 13.
[49] *Kernick* v. *Fitzpatrick*, (1907) T. S. 389.
[50] *Chabaud* v. *Knight*, 2 Searle, 6; *Pienaar* v. *Pretoria Printing Works and others*, (1906) T. S. 805.
[51] *Ries* v. *Willetts*, 20 S. C. 528.
[52] *Hare* v. *White*, 1 Roscoe, 246.
[53] *Watkins* v. *Tudhope*, 3 E. D. C. 209.

(1) Posting a man as "a coward."[54]

(2) Writing of a man that he is an atheist, and that he withholds from his infant child the sacramental seal of baptism.[55]

(3) Publishing of a man that he has exhibited the greatest cruelty and inhumanity, or that he has been guilty of a disgraceful act.[56]

(4) Writing of a medical man that he has been "guilty of conduct derogatory to the character of a gentleman and a professional man,"[57] or publishing of him in a newspaper that he advertises himself professionally by means of "skilfully engineered paragraphs in local papers."[58]

(5) An advertisement calling upon the plaintiff, whose address was well known to the defendant, an hotel keeper, "to call and pay his account and redeem his box of valuable papers."[59]

(6) Words implying that the plaintiff had supplied guns to Her Majesty's enemies during the war with the Republics.[60]

(7) Publishing of the leader of a commando that "he was by no means exculpated from the suspicion at least of having forced them (meaning the force under his command) to a disgraceful retreat, if not flight."[61]

Mere meaningless words of abuse, which are not derogatory to the plaintiff's character, and do not expose him to hatred, contempt, or ridicule, are not

[54] *Wallace* v. *Hill*, 1 Menzies, 347.
[55] *Bok* v. *Erasmus and Toerien*, 2 S. A. R. 164.
[56] *Payne* v. *Sheffield*, 2 E. D. C. 170.
[57] *Bailey* v. *Abercrombie and Chiappini*, 3 Menzies, 33.
[58] *Hartley* v. *Palmer*, 24 S. C. 228.
[59] *Conroy* v. *Bennett*, 4 H. C. 201.
[60] *Michau* v. *Cape Times*, 17 S. C. 526. See *Michau* v. *Argus Co.*, 18 S. A. L. J. 183.
[61] *Ryneveld* v. *Bain*, 3 Menzies, 11.

actionable,[62] though the speaker may possibly be liable under the provisions of the Police Offences Act.[63] Thus the Dutch words "*jouw gemeene bliksem,—jouw bliksemsche smeer-lap*" have been held not actionable, though it is doubtful whether the same decision would be given at the present day by judges acquainted with the language, inasmuch as the words are equivalent to the English words, "You low rascal,—you rascally blackguard," though when literally interpreted they are, as abuse, meaningless.[64] To call a person an "outsider," also, will afford no ground of action.[65]

The words "Then he must have made a false oath" have been held not actionable without extrinsic evidence that they were used *animo injuriandi;* and it was further held that even the words "Then he has made or sworn a false oath" did not, under the special circumstances of the particular case, necessarily imply that the plaintiff had wilfully sworn that which, at the time he swore, he knew to be false.[66]

CHAPTER XII.

CIRCUMSTANCES NEGATIVING MALICE.

Primâ facie evidence of malice being implied from the mere publication of words which are in themselves defamatory, and general damage being regarded as the natural consequence of such publication, it will be for the defendant, if he wishes to escape liability, to plead

[62] *Mann* v. *Booker*, 19 S. C. 419.
[63] *Levy* v. *De Villiers*, 18 S. A. L. J. 57.
[64] *Wolff* v. *Van Hellings*, 1 Menzies, 39.
[65] *Thompson* v. *Brown*, 14 S. C. 488.
[66] *Haupt* v. *Elster*, 3 Menzies, 39.

circumstances which negative the presumption of malice, or which may, in some few cases, justify their publication, even where there has been actual malice present. With this object in view, he may set up one or other of the following defences :—

(1) That the words complained of are privileged, or were uttered or published on a privileged occasion.

(2) That the words were true in substance and in fact, and that it was for the public benefit that they should be published.[1]

(3) That the words were a *bonâ fide* comment upon the public acts of a public man.[2]

(4) That the publication took place under other circumstances which negatived the *animus injuriandi*.[3]

Our common law recognized several cases, in which the situation of the person who utters or publishes injurious words, or the circumstances under which such words were uttered or published, were held to make the position of such person a privileged one and to remove to a greater or less degree the legal presumption of malice or the *animus injuriandi*.[4] The number of these cases has been increased in course of time in consequence of the gradual development of our social and political institutions and requirements.

A privileged communication may be defined as any communication made *bonâ fide* upon any subject matter, in which the party making the same has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty; and by the term "duty" is here meant not only duties

[1] *Botha* v. *Brink*, 8 Buch. 123; *Bloem* v. *Zietsman*, 14 S. C. 364; *Bok* v. *Erasmus and Toerien*, 2 S. A. R. 166.

[2] *Upington* v. *Saul Solomon & Co.*, 9 Buch. 260–261; *Payne* v. *Sheffield*, 2 E. D. C. 166.

[3] *Botha* v. *Brink*, 8 Buch. 130; *Diepenaar* v. *Hauman*, 3 Roscoe, 40.

[4] *Norden* v. *Oppenheim*, 3 Menzies, 53; *Loveday* v. *Lombard*, 3 Off. Rep. 42; Voet, 47 : 10 : 2 and 20.

legally enforceable, but even moral and social duties of imperfect obligation.[5]

A privileged occasion is one of such a nature that all communications made upon it are regarded in law as privileged.

Of privileged occasions some are absolutely privileged, whilst others have merely a qualified privilege.

Of occasions and communications which are absolutely privileged the only ones which are recognized by statute are those which are connected with freedom of speech and debate in Parliament and Parliamentary proceedings, and with the publication of the proceedings of either House of Parliament by order of such House.[6] No member of Parliament will therefore be liable to any action for words spoken by him during any debate or other proceedings in Parliament; but it will be otherwise with respect to statements made by a member elsewhere than in the House, such as at public meetings.[7]

Official communications between public officials are absolutely privileged under certain circumstances. The question as to when they are so privileged was fully considered in the case of *Fraser* v. *Sivewright*,[8] in which the following general principles were laid down by De Villiers, C.J.: "The public interest must be the paramount consideration in every case in which a party to a suit seeks to prevent relevant official communications from being admitted as evidence. (1) It is obviously for the public interest that official communications of the officers of the executive government amongst themselves or with their subordinates should,

[5] *Payne* v. *Sheffield*, 2 E. D. C. 171 and 173; *Davies* v. *Davies*, 3 E. D. C. 164.

[6] Act 1, 1854, secs. 1 and 2.

[7] *Loveday* v. *Lovelard*, 3 Off. Rep. 43.

[8] *Fraser* v. *Sivewright*, 8 S. C. 375.

without further enquiry, be privileged from disclosure. (2) The public interest equally requires that official communications, even such as are not made by or to officers of the executive government, should be privileged from disclosure, if they have been made by a subordinate official to his superior officer in obedience to some law or legal order. (3) As to official communications not falling within either of the classes just mentioned, they ought to be excluded if the Court is satisfied from the circumstances of the case that their disclosure would be prejudicial to the public interest. If the responsible head of the department, in whose custody the documents are, objects that they are State papers, and that it would be prejudicial to the public service to produce them, such objection, unless obviously frivolous, is conclusive; but, failing such objection, they are not necessarily privileged from disclosure merely because of their official or confidential nature. (4) No communications, however, which have not been made in the discharge of a public official duty ought to be excluded merely because they were addressed to the government."

By the law of England a judge of a superior Court has an absolute privilege with respect to all statements made by him on the bench, and consequently no action can be maintained against him, even though it be alleged against him that he spoke maliciously without reasonable and probable cause, and knowing his words to be false and without any relevancy to the matter at issue before him.[9] Whether the same absolute immunity is enjoyed by the judges of superior courts in South Africa, which have been created courts of record, has not yet been decided, and would seem

[9] Odgers, on Slander and Libel, 2nd ed., p. 187.

doubtful.[10] Under our common law the position of judges was not absolutely privileged, but at the same time it is the clear policy of our law, as it is of the English law, to impose no unnecessary fetters upon the freedom of judges and magistrates to comment upon all cases brought before them, and upon the conduct of all persons concerned in the same.[11] Judges and magistrates are classed together in this particular by our text-writers, by whom it is laid down that they are entitled by right and by virtue of their office to censure and correct litigants, advocates, attorneys, and suchlike, if they commit any fault, provided they do so with moderation and for cause, and not merely maliciously and with intent to injure; but that if they act with malice, which will not, however, be readily presumed, they will be liable in damages.[12]

In conformity with these principles it was held in the case of *Bosman* v. *Bisset*[13] that a magistrate was not liable for words spoken by him in Court with respect to certain supposed conduct of the plaintiff, who was a Justice of the Peace, out of Court, though the words were in fact false, on the grounds that the magistrate believed the statement to be true, though upon very slender evidence, and that he uttered them with the *bonâ fide* object of upholding the dignity of his office, and of reproving his inferior officer.

A litigant, also, who makes remarks with respect to a witness produced against him, in order to impugn his credibility, will be presumed to have acted without malice and merely with the object of defending himself,

[10] *Bosman* v. *Bisset*, 1 S. C. 324.
[11] *Ibid.*, 1 S. C. 323.
[12] *Ibid.*, 1 S. C. 319; Voet, 47 : 10 : 2 and 20.
[13] *Ibid.*, 1 S. C. 319. As to the position of counsel in a case, see *Chabaud* v. *Seagull*, (1906) E. D. C. 305.

even though he may not be in a position to prove his words, provided he had probable cause for believing them to be true: but if he utters words out of mere malice and with the object of injuring, he will be liable.[14] Thus, it has been held that it is lawful for an agent of an absent principal to impugn, in defence of the interests of his principal, the truth of evidence given by a hostile witness, without exposing himself to an action of damages, provided he does so without any *animus injuriandi*.[15]

A witness in a case is so far privileged as to statements made by him in Court whilst under examination on oath, whether with respect to one of the parties to the suit or some third party, that such statements are presumed to be true or, at least, it is presumed that the witness had probable cause for believing them to be true, and was not actuated by malice, until at least some evidence is brought by the plaintiff to rebut these presumptions of law in his favour.[16] But an action will lie against such witness for evidence given by him falsely, maliciously, and without reasonable or probable cause.[17]

As a corollary to the immunity enjoyed by members of Parliament for words uttered by them in Parliament, and of judges, magistrates, litigants, and witnesses for anything said by them in Court, it has been laid down that the publication of a fair report of Parliamentary or judicial proceedings in a newspaper is also privileged, even though it may contain imputations against the characters of third parties, even though these may not be parties to the proceedings

[14] Voet, 47 : 10 : 20.

[15] *Haupt* v. *Elster*, 3 Menzies, 39; *Botha* v. *Brink*, 8 Buch. 128.

[16] *Norden* v. *Oppenheim*, 3 Menzies, 46.

[17] *Norden* v. *Oppenheim*, 3 Menzies, 46; *Diepenaar* v. *Hauman*, 3 Roscoe, 41.

reported, provided the reports are impartial and accurate.[18] This immunity of newspaper reports rests upon two grounds, namely, (1) that, as reports of the proceedings of Courts of Justice are published in order to afford information to the public, the legal presumption of malice from the mere defamatory nature of the words uttered is rebutted by the occasion of publication; and (2) that the advantage to the community from publicity being given to such proceedings is so great, that the occasional inconvenience and injury to private individuals are entirely outweighed by considerations of the general good.[19] The immunity of such publications, however, only attaches to reports which are made in the ordinary course, but will not apply to a case where proceedings, having once been reported in the ordinary course at the time of their occurrence, are after the lapse of some considerable time exhumed and republished.[20]

The privilege attaching to reports of judicial proceedings does not extend to newspaper comments on such proceedings.[21]

A similar privilege has been extended to the reports of proceedings of Harbour Boards, and it has been held that the *bonâ fide* publication of a fair and impartial report of a discussion at a meeting of a Harbour Board upon a matter of public interest is not actionable, even though it may include injurious statements regarding the conduct of an individual.[22]

This rule, however, will not apply to the publication

[18] *Pickard* v. *S. A. Trade Protection Society and others*, 22 S. C. 94.

[19] *Webb* v. *Sheffield*, 3 E. D. C. 254; *Payne* v. *Sheffield*, 2 E. D. C. 171.

[20] *Botha* v. *Pretoria Printing Works*, (1906) T. S. 713.

[21] *Walpole* v. *Palmer and others*. 20 S. C. 67.

[22] *Smith & Co.* v. *S. A. Newspaper Co.*, 23 S. C. 310.

of the proceedings of a purely private and voluntary association, such as a Farmer's Association, and if false and defamatory matter is uttered at the meetings of any such association, any newspaper which publishes it will be liable.[23]

Meetings of Churchwardens or of a Consistory of the Dutch Reformed Church have also been held to be privileged occasions.[24] Objections, also, made by a member of a Church Vestry to the appointment of another person as Elder on the ground of the unfitness of the latter for the post have been held to be privileged, provided the objector can satisfy the Court that at the time he made the objections he had probable, that is, just and reasonable, cause for believing, and did actually believe, that the facts imputed by him were true.[25] Such person will not be held liable merely because he has been unable absolutely to prove the truth of his imputations.[26] The same rule will apply to a person making a charge of immorality against a clergyman, *bonâ fide* and believing it to be true, to the Vestry, whose duty it would be to enquire into such conduct, and, if necessary, to dismiss the clergyman.[27]

Meetings of Town Councils are privileged occasions as regards all statements made with respect to the business and duties of such councils, and such statements will therefore be privileged. A member has, therefore, been held not liable for stating at a meeting of the Council that the Mayor had made a false and fraudulent declaration of the result of a ballot, where it was proved that he had acted honestly and in the

[23] *Philpott* v. *Whittal and others*, (1907) E. D. C. 210.

[24] *Weeber* v. *Van der Spuy*, 2 Searle, 40.

[25] *Philpott* v. *Whittal and others*, (1907) E. D. C. 204.

[26] *Keyter* v. *Le Roux*, 3 Menzies, 23.

[27] *Davies* v. *Davies*, 3 E. D. C. 160.

bonâ fide belief of the truth of his words, and upon reasonable grounds and without malice.[28] On the same principle complaints made to a Municipal Council with respect to a public nuisance, in the course of which the defendant commented upon the past conduct of the plaintiff, an ex-Commissioner of the Municipality, with reference to similar complaints previously made by him, speaking of the latter as "the peculiarly coarse and insolent member who has for so long a time discredited your meetings," have been held to be privileged, inasmuch as they were made *bonâ fide* and without malice, and without imputing base or sordid motives, and had reference to the public acts of a public man.[29]

A meeting of a Licensing Board is also a privileged occasion, and statements made by a member of such Board at any meeting of the same with respect to an applicant for a license are therefore privileged communications, for which there will be no liability unless express malice be proved.[30]

It is the right and duty also of members of Chambers of Commerce to guard against the admission of improper persons as members of such Chambers. Any objections, therefore, made at a meeting of a Chamber against the admission of a particular individual as a member will be regarded as a privileged communication and not actionable unless there be evidence of express malice.[31] So also a communication made at such meeting *bonâ fide* and without malice, and upon reasonable grounds by one member concerning another member on a subject fairly within the

[28] *Hofmeyr* v. *Stigant*, 6 Buch. 95.
[29] *Watkins* v. *Ewing*, 3 E. D. C. 155.
[30] *Delia* v. *Neethling*, 4 Buch. 129.
[31] *Foord* v. *Goodliffe*, 6 Buch. 37.

scope of the objects of the Chamber, will be privileged. But where one member, actuated by an indirect and wrong motive, makes an unfounded statement to a Chamber of Commerce concerning another member, he will be liable in damages.[32]

The meeting of a School Committee is a privileged occasion as regards charges made against the principal of the school, but the party making such charges will nevertheless be liable if he was actuated by express malice in making them.[33]

In *Bailey* v. *Abercrombie and Chiappini*[34] it was held that the publication of a libel to the members of a Medical Society with regard to one of its members was not a privileged communication, but in face of the provisions of secs. 57 and 59 of Act 34, 1891, this ruling can hardly be held to apply to the Colonial Medical Council of the present day.

As regards public meetings, it has been held that a meeting held for the purpose of obtaining guarantors to a public school is not a privileged occasion for the purpose of discussing the fitness of the master of the school for his post, and any defamatory words spoken of him at such meeting will consequently be actionable, at any rate if they are proved to be absolutely groundless.[35] So also a meeting called by a municipality for a special purpose has been held not to be privileged for the purpose of making charges of misconduct against municipal officials, though the same charges might be privileged if laid before the municipality in proper form.[36]

[32] *Kröger & Co.* v. *Bettington*, 2 E. D. C. 361.

[33] *Dorothwaite* v. *Neethling*, 12 E. D. C. 203.

[34] *Bailey* v. *Abercrombie and Chiappini*, 3 Menzies, 33.

[35] *Bruce* v. *Callaghan*, 2 E. D. C. 259.

[36] *Tsewu* v. *Lloyd*, (1906) T. S. 410.

Proceeding now to communications of a private nature, it may be laid down as a general rule that where a communication has been made by a person who has an interest in the subject matter of the same, to another person who has a corresponding interest, the communication, if made *bonâ fide* and based upon reasonable grounds, will be privileged.[37] Thus, words spoken by a defendant of the plaintiff, a newspaper reporter, to the editor of the paper concerning the condition of the plaintiff on the occasion of an interview between the latter and the defendant, of which a false report had appeared in the paper, namely, that he was drunk at the time of the interview, have been held to be privileged on the grounds of common interest, and therefore not actionable where the defendant had reasonable cause for his statement.[38]

Defamatory words spoken to a private person who has no interest in the matter can in no case be privileged.[39]

Where privilege has once been established, whether as to the occasion or the communication, the presumption of malice arising from the defamatory nature of the words will be rebutted, and it then becomes incumbent on the plaintiff to prove express malice;[40] that is to say, actual ill-feeling or malice in the popular and general sense.[41]

Another common defence to actions of defamation

[37] *Botha* v. *Brink*, 8 Buch. 131; *Diepenaar* v. *Hauman*, 3 Roscoe, 41; *Roberts* v. *Duthie*, 11 S. C. 279; *Fyne* v. *Lee*, 17 S. C. 253; *Watson* v. *Van Heerden*, 6 E. D. C. 279; *Watson* v. *Gowan*, 15 E. D. C. 43; *Fick* v. *Watermeyer*, 4 Buch. 86.

[38] *Bulpin* v. *Jackson*, 13 S. C. 254.

[39] *Bloem* v. *Zietsman*, 14 S. C. 365.

[40] *Botha* v. *Brink*, 8 Buch. 123 and 128, and 3 Roscoe, 30; *Weeber* v. *Van der Spuy*, 2 Searle, 40 and 61; *Restall* v. *Mulloch*, 18 E. D. C. 77; *Innes* v. *Proctor*, 19 E. D. C. 60: *Fick* v. *Watermeyer*, 4 Buch. 89-90; *Pickard* v. *S. A. Trade Protection Society and others*, 22 S. C. 92; *Celliers* v. *Fagan*, 24 S. C. 372.

[41] *Reynolds* v. *Ainsley*, (1904) T. S. 870.

is justification, that is to say, that the words used are true in substance and in fact, and with respect to this it may be laid down that the truth of the words will not justify their publication in every case, but only where such publication is for the public benefit.[42] If a defendant, therefore, wishes to rely upon the truth of the words, he must both aver in his plea, and establish by evidence, that the words are true, and that some public benefit was to be derived from their being published. The truth is an ingredient, and a very important ingredient, in the defence, but it will not be conclusive, unless in addition the publication is for the public benefit.[43] *A fortiori* will the truth be a defence where the publication has been made in the execution of a statutory duty.[44]

It is in the public interest, for instance, that crimes should be brought to light and punished; and it would, therefore, not be just or fair to make a defendant liable in damages for uttering words charging the plaintiff with some crime, for which he has not yet been tried or punished, provided the charge can be substantiated.[45] In such a case the law will presume the absence of *animus injuriandi*.[46] But the truth of the criminal charge will have to be fully proved; for, though the detection of crime may be a matter of public interest, that will be no excuse for the making of charges which are groundless, even though there may be grave circumstances of suspicion against the person against whom

[42] G. 3 : 36 : 2; Schorer, Note 479.

[43] *Mackay* v. *Philip*, 1 Menzies, 460; *Sparks* v. *Hart*, 3 Menzies, 5; *Botha* v. *Brink*, 8 Buch. 124 and 130; *Michaelis* v. *Braun*, 4 S. C. 208; *Diepenaar* v. *Hauman*, 3 Roscoe, 40; *Rojesky* v. *Ross*, 4 H. C. 128; *Williams* v. *Shaw*, 4 E. D. C. 105; *Philpott* v. *Whittal and others*, (1907) E. D. C. 206; Kotze's Note to V. L., vol. 2, p. 300; Voet, 47 : 10 : 9.

[44] *Lappan* v. *Corporation of Grahamstown*, (1906) E. D. C. 40.

[45] Voet, 47 : 10 : 9.

[46] *Sparks* v. *Hart*, 3 Menzies, 5; Voet, 47 : 10 : 9.

they are made.[47] But where a crime had been actually committed, and there were reasonable grounds of suspicion against the plaintiff, and where the words complained of were uttered without malice, and in the course of a *bonâ fide* extra-judicial investigation, instituted with the view to recover the stolen property and discover the thief, the Court held the publication to have been privileged, in the same way as a communication to the police would have been under similar circumstances, and, therefore, not actionable.[48] Nay, even where the defendant fails to prove the full truth of his words, but succeeds in proving probable cause for his statements or some of them, and grave impropriety of conduct on the part of the plaintiff, the Court, though obliged to give judgment for the plaintiff, may mark its sense of the misconduct of the plaintiff by giving him merely nominal damages, and making him pay his own costs.[49]

The integrity of public officials is clearly a matter of public interest, and any one is, therefore, entitled to bring any misconduct on the part of such officials to the notice of the Government, provided this is done *bonâ fide* out of a sense of public duty, and not from malice.[50] Thus where a magistrate, for instance, was in the habit of introducing personal feeling into his public prosecutions, it was held that the public were entitled to bring the matter to the notice of the Government even by means of resolutions published at a public meeting, provided that the subject-matter of the resolutions is proved to be true. If, however, a resolution

[47] *Diepenaar* v. *Hauman*, 3 Roscoe, 43; Voet, 47 : 10 : 9.

[48] *Haupt* v. *Finlayson*, 3 Menzies, 38; *Painter* v. *O'Driscoll*, *ibid.* 62.

[49] *Hart and Constatt* v. *Norden*, 3 Menzies, 58; *Fyne* v. *Lee*, 17 S. C. 253; *Williams* v. *Shaw*, 4 E. D. C. 105; *Van der Berg* v. *Van der Watt*, 12 E. D. C. 55; *Upington* v. *Saul Solomon & Co.*, 9 Buch. 281–283.

[50] *Mackay* v. *Philip*, 1 Menzies, 463.

oversteps the limits of the truth to any serious extent, as by making a general charge, whereas the charge proved was confined to one particular instance, any proposer or seconder of such resolution will be liable in damages, but the Court may mark its sense of the misconduct of the magistrate by limiting the amount of the damages and by making him pay his own costs.[51]

A charge made at a meeting of the Africander Bond against a scab-inspector, by a person living in his district, of incompetence and malpractices in the performance of his duty, has been held to have been made in the public interest, and consequently, if true, not actionable.[52]

Where the public interest is in no way concerned in the subject-matter of defamatory words spoken against the plaintiff, as where he has been charged with a crime for which he has already been punished, or where mention has been made of a physical defect from which he was suffering, or where he has been charged with immodesty or immorality, the words will be presumed to have been spoken maliciously and with intent to injure, unless the defendant alleges and is prepared to prove facts negativing such intent on his part, and to show that the publication of the words had taken place under circumstances which rendered it a privileged communication.[53]

In the case of *Sparks* v. *Hart*,[54] it was laid down that justification could not be pleaded as regards words charging the plaintiff not with a crime, but with indecency and immodesty merely; but in *Bloem*

[51] *Meurant* v. *Raubenheimer*, 1 Buch. App. C. 87.

[52] *Van der Berg* v. *Van der Watt*, 12 E. D. C. 55.

[53] *Sparks* v. *Hart*, 3 Menzies, 5; Voet, 47 : 10 : 9 and 10.

[54] *Sparks* v. *Hart*, 3 Menzies, 5.

v. *Zietsman*,[55] De Villiers, C.J., said: "As to the question of what is for the public interest, I am not sure that, at the present day, the case of *Sparks* v. *Hart* would be supported. I think the decisions at the present day tend to widen the question of public interest." Again, in *Graham* v. *Ker*,[56] he stated: "It is for the public benefit that the truth as to the character and conduct of individuals should be known, so that persons who deal with them may be informed of their true character. Where, therefore, recent offences have been committed against the law or against society, it is open to any one to make the same known as a protection to the general public. It is otherwise, however, where the conduct imputed is of old standing. In such a case it is not to the public interest that stories as to past transgressions should be raked up with impunity, and any one found guilty of disseminating such stories will consequently be liable in damages."

The third defence we have mentioned is that of *bonâ fide* comment upon the public acts of a public man. As regards these, it is only fair and reasonable and in the public interest that, where a man takes upon himself to enter into public life and upon the performance of public acts and duties, he must be prepared to expect public criticism of his public acts and doings from all persons who are interested in public matters, and particularly from the newspapers, whose special business it is to publish everything that has a bearing on public business and to comment upon the same. It must not, however, be supposed that newspapers have any greater rights, privileges, or exemptions in this respect than any private individual.

[55] *Bloem* v. *Zietsman*, 14 S. C. 365. [56] *Graham* v. *Ker*, 9 S. C. 185.

It is open to newspapers, as well as to any private person, to publish facts which are true, provided their publication is for the public benefit.[57] They are also entitled to comment upon the acts and conduct of public men, provided these acts and conduct are capable of being proved, and even to suggest the motives which may honestly be thought to have influenced them; but they are bound to keep within the bounds of fairness and moderation, and their criticism must be honest and with a due regard for what truth and justice demand; and by fair and *bonâ fide* criticism is meant such as is not in excess of what the occasion requires, and which imputes no improper motives, except such as may fairly and reasonably be gathered from the conduct of the public man who is being criticized.[58] But if a newspaper or any private individual imputes to a public man improper acts which are not based on fact, and bases upon them defamatory expressions which are not justified by the facts actually proved, he will be liable in damages.[59]

The question in all such cases is whether, on the one hand, the words complained of were a fair criticism of a public man in his public capacity, and whether, on the other, the occasion was not merely taken advantage of in order to make a malicious attack upon a man in his private capacity.[60] Greater latitude is allowed in criticizing the acts of public men and public

[57] *Moodie* v. *Fairbairn*, 3 Menzies, 19.

[58] *Upington* v. *Saul Solomon & Co.*, 9 Buch. 260–261; *Payne* v. *Sheffield*, 2 E. D. C. 166.

[59] *Payne* v. *Sheffield*, 2 E. D. C. 166; *Ribbink* v. *Marais and Roos*, 4 S. A. R. 244; *Sauer* v. *Mendelssohn and Scott*, 2 S. A. R. 212; *Hartley* v. *Palmer*, 24 S. C. 228; *Farrar* v. *Hay*, (1907) T. S. 194; *Wyndham* v. *Wallach's Printing and Publishing Co.*, *Ibid.* 385.

[60] *De Jager* v. *Bryant*, 5 Buch. 149; *Sauer* v. *Mendelssohn and Scott*, 2 S. A. R. 210.

officials than would be permitted with respect to private individuals; but at the same time no writer or speaker is allowed to go beyond the limits of fair criticism. Whenever any one goes beyond that, and imputes even to a public man base, sordid, or corrupt motives for his acts, he will be bound to prove the truth of his charges, and that it was for the public benefit that they should be made known, or that the occasion or communication was privileged, and, if he fails, he will be liable in damages.[61]

The immunity of *bonâ fide* comment from the ordinary consequences of defamation has been held to apply even to criticism on an hotel-keeper, at any rate in regard to his treatment of travellers.[62]

Besides the defences of privilege, justification, and *bonâ fide* comment thus far dealt with, there are other cases in which the existence of malice will be negatived by the circumstances, such as that the words were spoken without premeditation during an altercation or quarrel between the plaintiff and defendant, or whilst the defendant was in a state of intoxication, or where the plaintiff has himself been the cause of the publication of the words.

Words defamatory in themselves will be excused, at any rate as far as any liability for damages is concerned, if spoken *in rixa*, especially if spoken by way of retort to insulting words previously but on the same occasion used by the plaintiff, provided they are withdrawn by the plaintiff before pleading.[63] The

[61] *Walter* v. *Powrie*, 7 Buch. 39, and Foord, 194; *Ribbink* v. *Marais and Roos*, 4 S. A. R. 244; *Philpott* v. *Whittal and others*, (1907) E.D.C. 206.

[62] *Payne* v. *Sheffield*, 2 E.D.C. 166.

[63] *Powel and her husband* v. *Price*, 1 Menzies, 500; *Wilhelm* v. *Beamish*, 11 S. C. 13; *Herschensohn* v. *Cohen*, Kotze, 255; *Foxcroft* v. *Meiring*, (1907) E. D. C. 113; Voet, 47 : 10 : 1 and 20; V. L., vol. 2, p. 300. See also *Pietersen* v. *October and others*, 11 S. C. 137; *Frazer* v. *Sivewright*, 3 S. C. 397.

fact of such insulting words having been uttered by the plaintiff on a previous occasion will not only be no defence, but will in addition tell against the defendant, inasmuch as it may show that his words were not spoken in the heat of the moment, but with deliberation, and out of a spirit of revenge, and therefore with personal malice.[64] Words uttered on a previous occasion, however, may be taken into account in considering the amount of the damages to be awarded, provided such previous slander is related in some way to the slander complained of by the plaintiff.[65]

Similar rules in some respects will apply to words spoken under the influence of intoxication or in a fit of rage, if they are withdrawn when the effect of the intoxication has passed off or the anger has had time to cool, or at any rate before the plea is filed.[66]

The action of damages will fail also where the plaintiff has himself been the immediate cause of the publication of the words, upon the principle of our maxim, *volenti non fit injuria*. Thus where the plaintiff, in order to entrap defendant into a repetition of words used by him in a privileged and confidential letter written by him to a third party, communicated the contents of such letter to a servant, with a view to the latter entrapping the defendant into a repetition of the defamatory words, which trapping was successfully accomplished, it was held that no action would lie.[67]

For the defendant to plead that he was not the originator of the slander or libel, but that he innocently

[64] *Cooper* v. *Nixon*, 4 Buch. 5.
[65] *Loveday* v. *Lombard*, 3 Off. Rep. 38.
[66] *Cooper* v. *Nixon*, 8 Buch. 5; Voet, 47 : 10 : 1.
[67] *Bennett* v. *Morris*, 10 S. C. 223.

repeated what was matter of public report or what was told him by another, will be no defence, even though he may be prepared to give the name of his informant, the originator[68]; but this circumstance may be taken into account by the Court in assessing damages.[69]

The action of damages for defamation will be prescribed by the lapse of one year, reckoned from the time that the plaintiff first became aware of the defamation, and the defendant, in pleading prescription, will have to allege that the plaintiff had such knowledge, and yet failed for more than a year to take action.[70] The action for an apology used apparently not to be prescribed in less than thirty years.[71]

The action of damages in the case of defamation fails, if the person defamed dies without having instituted the action, or if the wrong-doer dies before the institution of such action.[72] Even if such action has been instituted during the lifetime of both parties, it cannot be continued after the death of either of them, unless the stage known as the *litis contestatio* has been reached before such death.[73]

The action of damages will also cease whenever the plaintiff has forgiven the defendant, or when the matter has been satisfactorily settled by agreement between the parties.[74]

[68] *Mackay* v. *Philip*, 1 Menzies, 462; *Horstock* v. *Boniface*, *Ibid.* 468; *Bauman* v. *Smith*, 2 Buch. 301; *Ribbink* v. *Marais and Roos*, 4 S. A. R. 243; Voet, 47 : 10 : 9; Schorer, Note 479.

[69] *White* v. *Pilkington*, 1 Searle, 107.

[70] *Reid* v. *Van der Walt*, 2 Searle, 285; *Beukes* v. *Coetzee and Joubert*, 1 S. A. R. 71; Voet, 47 : 10 : 17 and 21; G. 3 : 35 : 3, and Groenewegen's footnote 6 thereon; Schorer, Note 480, last paragraph; V. L., vol. 2, p. 301.

[71] Voet, 47 : 10 : 17.

[72] Voet, 47 : 10 : 22.

[73] *Executors of Meyer* v. *Giericke*, Foord, 14; *Pienaar and Marais* v. *Pretoria Printing Works*, (1906) T. S. 654; G. 3 : 35 : 4; 3 : 32 : 10; Voet, 3 : 6 : 2, *in fine*.

[74] Voet, 47 : 10 : 23.

CHAPTER XIII.

PLEADING IN ACTIONS OF DEFAMATION.

Accurate pleading in cases of defamation is of the utmost importance, and it will, therefore, not be out of place to insert here the results of the decided cases in our Courts on the subject.

In the first place it may be premised that in actions based on libel, published in a newspaper, the editor, printers, and publishers may all be properly joined as co-defendants in one and the same action, on the principle that, where two or more persons are jointly concerned in the same wrongful act, they are all jointly and severally liable for the consequences.[1]

Proceeding to the declaration, the defamatory words will have to be set forth in the language in which they were originally spoken or published,[2] together with an exact and accurate translation.

An innuendo will not be essential in all cases (though one is almost invariably inserted), especially not where the defamatory meaning of the words is evident on the face of them; but where it is not quite clear, or where the words require some explanation owing to their having been used in an unusual or special sense, or under circumstances which altered their ordinary meaning, they will have to be accompanied by an appropriate innuendo, which will have to be such as is reasonably justified by the words themselves.[3]

[1] *Paterson* v. *McLoughlin and Saul Solomon & Co.*, 6 Buch. 62.

[2] *Reid* v. *Van der Walt*, 2 Searle, 285.

[3] *Rudd* v. *De Vos*, 9 S. C. 493; *Hillsdon and Hillsdon* v. *Hillsdon*, 25 S. C. 52.

Publication will also have to be both alleged and proved. It will not, for instance, be sufficient to state that the libel was contained in a letter *addressed to* a third party; it will be necessary to aver that it was actually sent to such person.[4]

As regards the possible defence of the defendant, it may be laid down that privilege and justification must be specially pleaded;[5] and they may properly be pleaded together in one and the same plea.[6]

If the defendant wishes to set up a plea of justification, he will have to aver not only that the words were true, but also that it was for the public benefit that they should be published in the manner in which and at the time when they were published.[7] The justification will also have to go to the full extent of the words and of their defamatory signification. Where, therefore, the plaintiff's innuendo to the words complained of was that he had been charged by the defendant with having wilfully and falsely given evidence in Court which was untrue, and with being a person not to be believed on his oath, a plea of justification which merely averred that as a matter of fact some evidence which had been given by the plaintiff was not in accordance with the fact, without alleging that the plaintiff, when he gave his evidence, had done so wilfully and with full knowledge of its falsity, has been held to be bad.[8]

[4] *Königsberg* v. *Stanislaus and another*, 21 S. C. 663.

[5] *Strasburger* v. *Orpen*, 15 S. C. 270.

[6] *Reynolds* v. *Ainsley*, (1904) T. S. 868.

[7] *Botha* v. *Brink*, 8 Buch. 124; *Diepenaar* v. *Hauman*, 3 Roscoe, 40; *Queen* v. *Hirsch*, 10 S. C. 107; *Frazer* v. *Sivewright*, 3 S. C. 380; *Wright and Molteno* v. *Cape Times*, 21 S. C. 390; *Marx* v. *Hess*, 1 Off. Rep. 234.

[8] *Beck* v. *Aldum and Harvey*, 3 Menzies, 21. See also *Sutherland* v. *McDonald*, 3 Menzies, 6; *Hill* v. *Curlewis and Brand*, *Ibid.* 520.

A defendant may properly deny a part and justify the remainder of the words complained of in a particular count of the declaration, provided these parts are clearly separable.[9]

Where a justification is set forth in too general terms, the plaintiff may ask for particulars;[10] but this he will not be allowed to do after he has joined issue on the defendant's plea.[11]

Where the words complained of are in themselves not defamatory, and no circumstances are alleged which could possibly attach a defamatory meaning to them, the proper course for the defendant is to except to the declaration as disclosing no cause of action, and, if he fails to do so, he may later on be mulcted in any costs which may have been necessitated by his not having done so. Where, therefore, a defendant set up a plea of justification to words which were not libellous, the Court, though giving him absolution from the instance at the trial, made him pay the costs incurred by the plaintiff in connection with his plea of justification.[12]

A plea of justification, if persisted in, will, in the event of failure, aggravate the damages,[13] and will even destroy the effect of a previous apology, amounting as it does to a deliberate repetition of the libel.[14]

In any case the defendant will be entitled to lead evidence to prove facts relevant to mitigation of damages, without these having been set forth in his plea.[15]

[9] *Botha* v. *Brink*, 8 Buch. 121 and 3 Roscoe, 30. But see *Sparks* v. *Hart*, 3 Menzies 3.

[10] *Shaw* v. *Williams*, 4 E. D. C. 107–108. But see *Stirrock* v. *Birt*, 8 S. C. 119.

[11] *Paterson* v. *McLoughlin and Saul Solomon & Co.*, 6 Buch. 82.

[12] *Reynolds* v. *Bain*, 3 Menzies, 11.

[13] *Payne* v. *Sheffield*, 2 E. D. C. 166.

[14] *Bailey* v. *Abercrombie and Chiappini*, 3 Menzies, 33.

[15] *Moodie* v. *Fairbairn*, 3 Menzies, 18.

CHAPTER XIV.

WRONGS AGAINST CHASTITY AND THE MARRIAGE LAWS.

AMONG wrongs affecting the reputation may be mentioned wrongs against chastity. These may be inflicted either with or without the consent of the person wronged, that is to say, it may amount merely to seduction or may consist in forcible rape.

By our law rape is a crime and not merely a civil wrong, and consists in having carnal knowledge of a woman violently and against her will,[1] whether such woman be a virgin or a married woman. It is an *injuria* proper, being not only an assault upon the body of the woman ravished, but also a wrong to her honour, dignity and reputation, and will entitle her to an action for compensation in damages, the measure of damages being the same as in the case of seduction, but with the addition of further damages in consideration of the forcible character of the wrong, the atrocity of the assault, and the bodily injury and pain suffered by the woman.[2]

Grotius states that this action must be instituted within six weeks after the commission of the crime or after the woman is able to get about again, but this view is rejected by Groenewegen in his footnote to Grotius, where he states that according to the commentators such claim can always be instituted within thirty years,[3] and also by the jurists in the *Rechtsgeleerde Observatien*,[4] and by Decker in his footnote to Van Leeuwen's Commentaries on Roman-Dutch Law.[5]

[1] V. L., vol. 2, pp. 302 and 295; V. L., C. F., part 1 : 5 : 23 : 10.
[2] G. 3 : 35 : 7.
[3] See Grotius, 3 : 35 : 7, and Groenewegen's footnote 14 thereto.
[4] R. Obs., Part I., obs. 95.
[5] V. L., vol. 2, p. 303, note *d*.

Seduction is the carnal connection of a man with a virgin, which by our law, differing in that respect from the law of England, entitles the latter to an action for compensation in damages, the damage consisting in the loss of her virginity and the consequent deterioration of her marriageable value in the marriage market.[6] This right of action is a departure from the general principle of our law, which lays down that where there has been consent there can as a general rule be no *injuria* or wrong in the eye of the law, at any rate as far as the injured girl is concerned, the maxim of our law being *volenti non fit injuria.*[7] The injury caused to the virgin, therefore, in the case of seduction would, if the general rule of our law applied, have amounted to *damnum absque injuriâ* or damage for which no action will lie, seeing that seduction implies consent on the part of the girl; but it has been expressly otherwise provided by our law.[8] The action is, in fact, *sui generis*, having been, in the first instance, introduced into the Netherlands by local laws and afterwards made general by custom, because of the supposed frailty and weakness of women.[9]

The proper person to sue in an action of seduction is the injured girl herself, assisted, if she be a minor, by her father or guardian.[10] Where the action is merely for the lying-in expenses the father himself may sue, if he has defrayed them or made himself liable for them.[11]

It is essential that the injured girl shall have been a virgin at the time of the seduction. Consequently the action will not lie at suit of a widow; nor will it

[6] *Carelse* v. *Estate of De Vries*, 23 S. C. 539; V. D. L., p. 251.
[7] G. 3 : 35 : 8.
[8] *Carelse* v. *Estate of De Vries*, 23 S. C. 539.
[9] G. 3 : 35 : 8.
[10] *Webb* v. *Langai*, 4 E. D. C. 68.
[11] *Ibid.*

lie at suit of a girl who prior to the seduction had already lost her virginity by sexual connection with some other man,[12] and with respect to whom it may be laid down that she will have no action against either the first or second seducer.[13] In any case the burden of proving that the girl has been seduced or that she had previously had connection with some one else, will be upon the person asserting the fact.[14]

The action will fail also where it is clearly proved that the girl, so far from being seduced, was herself the seducing party or stipulated for some remuneration for the connection, in which case she is regarded as no better than a prostitute.[15]

In the same way the action for compensation will fail where the seducer is a married man, and the girl was aware of the fact at the time of the connection; or was a bachelor indeed, but related to the seduced girl within the forbidden degrees of relationship, and therefore unable to compensate her by marriage, for which the claim for damages is merely an alternative.[16] The action will fail also where the girl has since the seduction got married to another man, or refuses to marry the seducer, or, being a minor, has been forbidden by her parents to marry him.[17]

The consequence of seduction under the common law is that the seducer may be compelled by action either to marry the seduced party or, in default, to pay her compensation in money, the compensation being regarded as merely an alternative, in case of the seducer refusing to marry the girl. The action will,

[12] Voet, 48 : 5 : 4; Schorer, Note 477; V. L., C. F., Part 1 : 5 : 23 : 2; V. D. L., p. 251.
[13] Voet, 48 : 5 : 4.
[14] *Ibid.*
[15] Voet, 48 : 5 : 4; Schorer, Note 477.
[16] Voet, 48 : 5 : 4; V. D. L., p. 252.
[17] Voet, 48 : 5 : 4.

therefore, cease whenever the girl has herself put it out of her own power to marry the seducer.[18]

If any child is born as the result of the seduction, the seducer will in any event be liable for the maintenance of the child, and for the lying-in expenses, and the funeral expenses of the child if it should die.[19]

The amount of damages will have to be calculated according to the position and circumstances of both parties, the measure of damages depending, amongst other things, upon the additional amount the girl would require as dowry in order to enable her to marry an equal, and that whether she herself be rich or poor.[20] The Court will also in assessing the damages be guided by all the circumstances of the case, such as the fact that the seduction had taken place under a promise of marriage, and that the plaintiff is in the family way by the defendant.[21]

If the man absolutely denies the seduction, the burden of proof will be upon the woman to establish it.[22] If in such a case there be no proof *aliunde* to leave the Court to doubt the man's oath, the man's oath must under our law be taken in preference to that of the woman;[23] but the fact of the man being married would have a tendency to weaken the force of his evidence in the eyes of the Court.[24] If, on the other hand, there be evidence *aliunde* to support the

[18] Voet, 48 : 5 : 2; G. 3 : 35 : 8; V. L., vol. 2, p. 302; V. L., C. F., part 1 : 5 : 23 : 4; V. D. L., p. 251.

[19] *Ludekins* v. *De Villiers*, 3 Menzies, 461; G. 3 : 35 : 8; V. L., vol. 2, p. 302 and 295; V. L., C. F., part 1 : 5 : 23 : 5; V. D. L., p. 251.

[20] *Ludekins* v. *De Villiers*, 3 Menzies, 461; Voet, 48 : 5 : 3; Schorer, Notes 477 and 478; V. L., vol. 2, p. 302.

[21] *Hart* v. *Yates*, 3 Off. Rep. 201.

[22] Voet, 48 : 5 : 6.

[23] *Gleeson* v. *Durrheim*, 1 Buch. 244; *Crowe* v. *D.*, 4 Searle, 227; *Le Roux* v. *Neethling*, 9 S. C. 247; *Bentley* v. *Norman*, 14 E. D. C. 4; G. 3 : 35 : 8; V. L., vol. 2, p. 303; V. D. L., p. 252.

[24] Voet, 48 : 5 : 6.

oath of the woman and to lead the Court to give it credence in preference to that of the man, the Court will be bound to accept her oath, thus corroborated.[25]

Where the weight of evidence is pretty equally balanced, the benefit of the doubt should be given to the defendant, in the same way as in a criminal case.[26]

If the man admits having had connection with the girl, but denies that he is the father of the child, the girl will be believed as to the paternity, even though it be proved that other men have had connection with her, unless the man can show that, from the date upon which he had connection with her and the other circumstances of the case, it is physically impossible for him to be the father,[27] or unless the Court is of opinion that the woman is generally not worthy of belief.[28]

The action of seduction becomes prescribed after the lapse of thirty years.[29]

As regards the effect of the death of the girl upon the right of action, Voet says that opinions vary as to whether the right is extinguished or not. He himself, however, was of opinion that a distinction ought to be drawn, and that the action would pass to the executor of the girl, provided she had before her death already instituted an action against the seducer, because by such institution she had put the latter *in morâ*, and, in consequence of his delay in offering to marry her before her death, he had lost the right of option which

[25] *Gleeson* v. *Durrheim*, 1 Buch. 244; *Van der Berg* v. *Elsbeth*, 3 S. C. 36; *Gouws* v. *Hartlief*, 18 E. D. C. 280.

[26] *Botma* v. *Retief*, 5 Buch. 120; *Le Roux* v. *Neethling*, 9 S. C. 247.

[27] Voet, 48 : 5 : 6; G. 3 : 35 : 8. Schorer, Note 49; V. L., vol. 2, p. 303.

[28] *Smitsdorp* v. *Horne*, 1 Roscoe, 32.

[29] Voet, 48 : 5 : 5; Schorer, Note 477; V. L., C. F., part 1 : 5 : 23 : 13. See also *Carelse* v. *Estate of De Vries*, 23 S. C. 539. But see V. L., vol. 2, p. 303.

he had to marry her, and was therefore obliged to accept the other alternative, namely, the payment of damages.[30] Where, however, no action had as yet been commenced by her, the right of action would not pass to her executor, because the seducer had thus by natural causes and without any fault or delay on his part been deprived of his right of option.[31]

The death of the seducer, however, will in no way affect the girl's right of action, which will continue against his estate for compensation in damages, that being the only alternative left open to her.[32]

The action for maintenance of the child, at any rate, which is a right rather of the illegitimate child than of the mother, will not be lost by the death of the father.[33]

Adultery is another form of wrong as regards chastity, but it is only actionable in so far as it is a wrong against the marriage rights of the injured spouse. It was under the common law regarded as a crime and punished as such, but prosecutions for this crime have become obsolete, and the only remedy now left to the injured spouse, generally the husband, is an action for compensation in damages.[34] This claim is generally instituted in one and the same action brought against the offending spouse, the person with whom the adultery has been committed being joined as co-defendant or, as he is more usually called, co-respondent.[35] There is nothing, however, to prevent a husband from suing for compensation in a separate

[30] Voet, 48 : 5 : 5; Schorer, Note 477.

[31] Voet, 48 : 5 : 5; Schorer, Note 477.

[32] *Ex parte* Levengeld, 4 S. C. 65.

[33] *Carelse* v. *Estate of De Vries*, 23 S. C. 537.

[34] *Dantiele* v. *Umtirara*, 9 S. C. 452; *Biccard* v. *Biccard and Fryer*, *Ibid.* 473; Voet, 48 : 5 : 11; V. L., vol. 2, p. 305; *Norton* v. *Spooner*, 9 Moore's P. C. C. 122.

[35] *Biccard* v. *Biccard and Fryer*, 9 S. C. 473.

action, and that even without having first sued his wife for divorce, though the fact of his not having done so may raise a presumption of collusion which he will have to be prepared to meet by satisfactory evidence.[36]

The amount of damages will depend upon the position of the parties and the circumstances of the case; and the fact that the plaintiff before the adultery failed to treat his wife with the kindness and consideration to which she was entitled, will form an important element in estimating the damages.[37]

An action in damages will also lie at suit of the husband against a third party for merely harbouring his wife and detaining or keeping her away from him, even without any immoral intention, the wife having left her husband without any reasonable or probable cause.[38] The essence of the wrong in this case is *mala fides* on the part of the harbourer who retains the wife against the wish of her husband, whose conduct has been in every respect quite correct and proper.[39] There will be nothing, however, to prevent any one from sheltering a wife who has left her husband's house, and who represents herself as having been ill-treated and turned out of doors by her husband, even though it should afterwards turn out that her representations were false.[40]

[36] *Biccard* v. *Biccard and Fryer*, 9 S. C. 473.

[37] *Ibid.*

[38] *Le Roux* v. *Van Wyk*, 1 Menzies, 253; *Rendwaldson* v. *Weiss*, 5 Buch. 150; *Kramarski* v. *Kramarski and others*, (1906) T. S. 937.

[39] *Abner Major* v. *John Maketha*, 1 E. D. C. 52; *Philip* v. *Squire*, 1 Peake, 114.

[40] *Abner Major* v. *John Maketha*. 1 E. D. C. 53; *Kramarski* v. *Kramarski and others*, (1906) T. S. 937.

PART III.—THE DISSOLUTION OR EXTINCTION OF OBLIGATIONS.

CHAPTER I.

FULFILMENT OR PAYMENT.

We have dealt from time to time, in the previous parts of this book, with some of the modes in which obligations, whether based upon specific contracts or arising out of wrongs, are extinguished or dissolved. We proceed now to treat of the dissolution or extinction of obligations as a whole.

The dissolution of an obligation, then, may take place either judicially or extrajudicially.[1]

Extrajudicially, it takes place either by actual or by fictitious—that is, implied—fulfilment or payment of the obligation or debt.[2]

Actual fulfilment is effected either by specific performance of the obligation,[3] or by accord and satisfaction, which latter is effected either by payment of the penalty, where any has been agreed upon,[4] or by the payment, with the consent of the creditor, obligee, or other party to the obligation, of compensation in damages for any loss or damage which may be caused to the latter by reason of the obligation not having been specifically performed or carried out.[5]

Fictitious fulfilment takes place whenever a state

[1] Voet, 46 : 3 : 17.
[2] Voet, 46 : 3 : 1 ; G. 3 : 39 : 6.
[3] G. 3 : 39 : 7.
[4] G. 3 : 3 : 41.
[5] Voet, 46 : 3 : 1 and 17 ; V.D.K., Th., 512 and 834; Schorer's Note 311. See also the judgment of Cloete, J., in *Muller Bros.* v. *Kemp and others*, 3 Searle, 155; Groenewegen's footnote 94 to G. 3 : 3 : 41.

of facts supervenes which makes it impossible to grant specific performance, or which, in contemplation of law, is equivalent to performance.[6]

As regards actual fulfilment or payment, it may be premised that, in order that it may act as an acquittance or discharge of a debt or obligation, it is essential that both the parties to such payment shall be competent to contract, and thus qualified, the one to give and the other to receive, the payment.[7]

As a general rule, a minor, lunatic, or prodigal, or person who is under curatorship, is incompetent to make a valid payment without the consent of his guardian or curator.[8] This rule, however, will vary, according as the payment is made in settlement of an obligation contracted with or without the guardian's consent. In the latter case, the obligation being null and void, the payment made without the guardian's consent will also be null and void, and the money paid may be recovered by *vindicatio* if still in existence; and, if consumed, by the *condictio ex causâ indebiti*, that is, an action based on want of consideration.[9] In the former case, the money may be recovered by *vindicatio* if still in existence, the obligation, however, continuing in force; but, if consumed, the amount cannot be recovered, nor will relief on the ground of minority be allowed, the payment, however, acting as a discharge of the obligation.[10]

A minor or person under curatorship is also incompetent to receive a payment or grant a valid receipt without the consent of his guardian or curator. Such a payment will have no effect to release the debtor,

[6] Voet, 46 : 3 : 1 and 17.
[7] Voet, 46 : 3 : 1; G. 3 : 39 : 7, 8 and 14; Schorer, Note 489.
[8] G. 3 : 39 : 8; 3 : 30 : 11.
[9] Voet, 4 : 4 : 21; 46 : 3 : 1.
[10] Voet, 4 : 4 : 21; 46 : 3 : 1; G. 3 : 39 : 11.

except in so far as the minor has been enriched thereby.[11]

A wife also, who is under the marital authority of her husband, is incompetent to make a valid payment of an obligation without her husband's consent, even as she is incompetent also to contract without his assistance. Thus a *pactum de non petendo*, or agreement not to sue, entered into by her, or a gratuitous discharge of a debt, or a renunciation of any right made by her without her husband's consent, will be null and void.[12] If a wife, whilst subject to her husband's marital power, makes a payment in settlement of a debt contracted by her during the marriage without her husband's consent, the husband may, during the subsistence of the marriage, and she may, after its dissolution, reclaim the amount so paid by her. She may, also, do so even where the payment has been made by her after her husband's death, in satisfaction of a debt so contracted, if she makes the payment under the mistaken impression that she is legally bound to do so; but it would be otherwise if she does so spontaneously, and with full knowledge that she cannot be legally compelled to pay.[13]

A wife is equally incompetent to receive payment, without her husband's consent, of any amount due either to him or to her; and such payment, if made, will not release the debtor, except in so far as the payment has been converted to the husband's benefit, or unless the amount paid be so small that it may be regarded as having been again spent by her on the household expenses.[14]

[11] Voet, 4 : 4 : 22; 46 : 3 : 5; G. 3 : 39 : 14.
[12] Voet, 23 : 2 : 50.
[13] Voet, 12 : 6 : 19.
[14] Voet, 23 : 2 : 50; 46 : 3 : 5.

Between the date of the granting of an order of sequestration and the making of the order allowing and confirming the account and plan of distribution in an insolvent estate, the insolvent will, as a general rule, be incompetent to give fulfilment or make payment in fulfilment of an obligation or debt, by delivering or ceding any property, money, or right belonging to the estate.[15]

Payment need not necessarily be made by the debtor personally, but may take place through an agent properly authorized for the purpose.[16] It may even be made by a third party without the knowledge and against the will of the obligor or debtor,[17] provided only that the payment is made in the name of the debtor, and not in that of the party making it,[18] unless indeed the latter is himself liable for the debt as co-debtor or surety.[19] Fulfilment of an obligation cannot, however, be made through a third party, if the obligation is of a personal character, and contracted with a view to special qualifications or skill on the part of the obligor, in which case the obligation can be validly fulfilled only by himself.[20]

Payment may be made even against the will of the creditor,[21] provided it is made to the creditor himself or to some one authorized to receive payment, whether as being a joint creditor[22] or as being the holder of a general power of attorney or under a special power granted for the purpose.[23] No valid

[15] Ord. 6, 1843, secs. 46–49.

[16] Voet, 46 : 3 : 1; G. 3 : 39 : 7 : Schorer, Note 493; Dekker's Note (*b*) to V. L., vol. 2, p. 328.

[17] *Union Bank* v. *Beyers*, 3 S. C. 102; *Trustee of Storey* v. *Du Preez*, 15 S. C. 171; G. 3 : 39 : 10.

[18] G. 3 : 39 : 10; V. D. L., p. 264.

[19] G. 3 : 39 : 10.

[20] Voet, 46 : 3 : 1; V. D. L., p. 265.

[21] G. 3 : 39 : 13.

[22] Voet, 46 : 3 : 2; V. L., vol. 2, p. 232.

[23] Voet, 46 : 3 : 3 and 4; G. 3 : 39 : 13; Schorer, Note 495; vol. 2, p. 332; V. D. L., p. 265.

payment can, however, be made to a person who has merely been appointed for another special purpose, such as the conduct of a suit or the sale of an article,[24] nor to an agent whose power to act has been withdrawn, unless the debtor makes such payment to him *bonâ fide*, and without knowledge of such withdrawal.[25]

A payment made to a sheriff upon service of a *summons* will not be valid, the receipt of payment being *ultra vires* of the sheriff at that stage of the case, the duty of the sheriff being not to receive payment of the debt, but to summon the defendant to appear to answer the claim.[26] The same rule, according to Voet,[27] applied to a payment made to a sheriff when executing a writ, but this can hardly apply to a sheriff at the present day who, by the terms of the writ of execution, is distinctly commanded "of the goods and chattels" of the defendant to "cause to be made the sum of £—."

As regards the subject-matter of the fulfilment, the following rules may be laid down :—

1. There must be specific performance of the very thing which has been undertaken to be performed.

2. The whole of what is due must be paid, otherwise the debtor will not be released.

3. Payment or fulfilment must be made at the time and place agreed upon.

4. On the part of the creditor a receipt must be given, if demanded.

An immoral payment may be set aside where the dishonourable conduct is on the side of the receiver alone, or on the side of both receiver and payer, but not if on the side of the payer alone.[28]

[24] Voet, 46 : 3 : 3.
[25] Voet, 46 : 3 : 3 and 5.
[26] *Ibid.*
[27] *Ibid.*
[28] G. 3 : 30 : 17; 3 : 1 : 43.

The performance may consist either in the doing of an act or in the giving of a thing,[29] but whichever of these it may be, it will have to be strictly carried out in terms of the contract or agreement, for an obligation cannot, without the consent of both parties, be dissolved otherwise than by the performance of the very act or the giving of the very thing agreed upon.[30] In the case of a contract, therefore, a creditor may insist upon specified performance of the same,[31] for the debtor cannot without the creditor's consent release himself by merely paying compensation in damages.[32] It will, however, be in the discretion of the Court in an action for specific performance to grant the same or not, as it may think equitable or expedient, and it will not be granted where it would be impossible for the defendant to carry out the order, or where the interest of an innocent third person would suffer by its being carried out.[33]

The usual practice in such an action is to insert in the declaration an alternative claim for damages, so that at any rate compensation in damages may be secured, in case specific performance cannot be granted. Where a plaintiff claims specific performance without such alternative, the Court will not, as a matter of course, award damages as an alternative;[34] but may do so where the defendant has put it out of his own power to give specific performance, or has

[29] G. 3 : 39 : 8.

[30] *Roome* v. *Brown*, 3 S. A. R. 6; Voet, 46 : 3 : 8; G. 3 : 39 : 9; Schorer, Note 494; V. L., vol. 2, p. 329; V. D. L., pp. 264 and 266.

[31] V. L., vol. 2, pp. 27 and 141, and Kotze's note thereon.

[32] Voet, 46 : 3 : 1 and 17; V. D. K., Th. 512 and 834; Schorer, Note 311. See also Cloete, J., in *Muller Bros.* v. *Kemp and others*, 3 Searle, 155; Groenewegen's footnote 94 to G. 3 : 3 : 41; V. L., vol. 2, pp. 27 and 141, and Kotze's note thereon. But see Voet, 19 : 1 : 14; V. L., C. F., part 1 : 4 : 13 : 12.

[33] *Shakinovsky* v. *Lawson and Smulowitz*, (1904) T. S. 330; *Rissik* v. *Pretoria Municipal Council*, (1907) T. S. 1024.

[34] *Alexander* v. *Armstrong*, 9 Buch. 239.

been proved by his own conduct to be incompetent to do so.[35]

Fulfilment will have to be made as a whole, no creditor being bound to accept payment or performance by instalments, unless he has agreed to do so.[36]

It will also have to be made in strict conformity with the terms of the obligation or contract.[37] But where it has been agreed that a payment was to be made "in German money," it was held that a tender of English money, less the exchange, which was at the time in favour of English money, was sufficient.[38]

As a general rule, fulfilment will have to take place at the place and time agreed upon.[39]

A stipulation as to time, for instance, will have to be strictly carried out and, where this is not done, the party guilty of the delay will be liable for any damage caused thereby to the other contracting party, provided time be of the essence of the contract.[40] We say "provided time be of the essence of the contract," because, as was pointed out in an earlier part of this work,[41] it does not follow as a matter of course that whenever time is mentioned in connection with the performance of a contract, performance will have to be given or tendered on or before the day mentioned, but only *when*, from the nature of the particular transaction, or from the express terms of the contract, *time is of the essence* of the contract. The mere mention of a

[35] *Norden* v. *Rennie*, 9 Buch. 155; *National Butchery Co.* v. *African Merchants*, (1907) E. D. C. 57 and 138.

[36] Voet, 46 : 3 : 11; G. 3 : 39 : 9; Sehorer, Note 490; V. D. L., p. 266.

[37] Voet, 46 : 3 : 8 and 10.

[38] *Van Niekerk* v. *Le Riche*, 24 S. C. 31.

[39] G. 3 : 39 : 9.

[40] *Burd* v. *Townsend*, 3 Menzies, 421; *Silverton Estates Co.* v. *Bellevue Syndicate*, (1904) T. S. 466; Voet, 13 : 4 : 2 and 3; 13 : 3 : 3; 45 : 1 : 19; 46 : 3 : 12; G. 3 : 1 : 46; 3 : 39 : 9.

[41] See Vol. iii., p. 156 *et seqq.*, and the authorities there cited.

time for performance will not be conclusive as to time being of the essence of the contract; for if it appears that what the parties really contemplated was that performance should be made within a reasonable time, a party in default according to the letter of the contract will still be able to enforce it in accordance with what the Court considers to have been the real intention of the parties.

Where punctual performance is not of the essence of the contract, performance within a reasonable time will be regarded as a sufficient compliance.[42]

A stipulation as to time may of course be waived by the creditor.[43]

It may be as well to add that where anything is stipulated to be done on a particular day, or in a certain month or year, the debtor will be entitled to the whole of such day or month or year for carrying out his contract, and the whole of such period will have to have expired before fulfilment can be enforced by action.[44]

Payment may be made before the time agreed upon, but in that case it will have to be made in exactly the same terms in which it would have had to be made if it had taken place at the proper time, *e.g.*, if a debt is bearing interest, it will have to be paid with interest up to the due date, even if it be paid in advance.[45]

Where there has been no stipulation as to time, the obligation becomes vested at once, and either party will be entitled to give or demand fulfilment at once.[46]

Fulfilment will, in like manner, have to be given

[42] *Joel* v. *Dolman*, 6 S.C. 137.
[43] *Rimer* v. *White*, 21 S. C. 6.
[44] Voet, 45 : 1 : 19; G. 3 : 3 : 50; V. L., vol. 2, p. 33.
[45] G. 3 : 39 : 9; Schorer, Note 492; V. L., vol. 2, p. 332.
[46] Voet, 45 : 1 : 19; 46 : 3 : 12; 13 : 4 : 3; G. 3 : 3 : 51 and 53.

at the place specified in the obligation,[47] the creditor not being bound to accept fulfilment at any other place, unless compensation be at the same time tendered to him for any prejudice he may suffer by reason of its having taken place elsewhere.[48] If, however, a creditor voluntarily accepts payment at another place, without demanding such compensation, he will not be allowed to sue for the same later on.[49]

If no place for fulfilment has been agreed upon, it will have to be made at the place where the obligation was contracted, not necessarily at the house of the creditor, but at any place where he may reasonably be expected to accept payment.[50]

Where two places for fulfilment are stipulated for in the alternative, namely, "at London or at Amsterdam," the debtor will have the right of election as to which place he will grant fulfilment at; but if he fails to elect before the due date, he will lose his right of election, which will then pass to the creditor.[51]

The place agreed upon for fulfilment will be a competent forum for suing the debtor in, provided he is subject to the jurisdiction in other ways;[52] but there will be nothing to prevent the creditor from suing him elsewhere in a Court which has jurisdiction over him.[53]

By our law a debtor may insist upon a receipt, and is not bound to pay his debt unless the creditor is ready and willing to give him a receipt.[54]

A receipt will not necessarily be conclusive evidence

[47] G. 3 : 39 : 9.
[48] Voet, 13 : 4 : 6 and 7; 13 : 3 : 4.
[49] Voet, 13 : 4 : 7.
[50] Voet, 46 : 3 : 12; Schorer, Note 491.
[51] Voet, 13 : 4 : 4.
[52] Schorer, Note 491.
[53] Voet, 13 : 4 : 5.
[54] *Van Noorden* v. *De Jongh and Hofmeyr*, 9 S. C. 296; Voet, 46 : 3 : 15.

of a payment, but may be rebutted by parol evidence,[55] and will afford ground for the exception *non numeratæ pecuniæ*, provided the defence be taken within thirty days after giving the receipt.[56]

A double payment will be presumed to have been made where two receipts are produced by the debtor for the same debt, but bearing different dates, and of which the later makes no reference to the earlier. In such a case the burden of proof will be on the creditor, to show that one or other of the alleged payments was not made.[57]

If a person, who owes several debts to one and the same person, makes a payment, he may elect before or at the time of such payment, in satisfaction of which debt he wishes the payment to be appropriated ;[58] and, if he fails to do so, the creditor may do so.[59]

The appropriation must, however, be made either before or at the time of the payment, so that it may be open to the creditor to refuse to receive the payment, subject to the debtor's appropriation, or to the debtor to refuse to make it upon the terms of appropriation suggested by the creditor.[60] But where an appropriation appears from the books of the creditor to have been made in a certain way, it will be presumed to have been made at the time the payment purports to have been made, until the contrary be proved.[61]

If the debtor's intention to appropriate was declared

[55] Voet, 19 : 1 : 18, *in fine*.

[56] Voet, 12 : 1 : 32, *in fine* ; V. L., C. F., part 1 : 4 : 14 : 7.

[57] Schorer, Note 460.

[58] *Brady and Ryan* v. *Standard Bank*, 2 E. D. C. 186; *Executors of J. Watermeyer* v. *Executor of E. B. Watermeyer*, 3 Buch. 72.

[59] *Scott* v. *Sytner*, 9 S. C. 53; *Stiglingh* v. *French*, 9 S. C. 411; *Jefferson, N. O.* v. *De Morgan*, 2 E. D. C. 211 and 213; Voet, 46 : 3 : 16; G. 3 : 39 : 15; V. D. L., p. 267.

[60] *Stiglingh* v. *French*, 9 S. C. 411; Voet, 46 : 3 : 16.

[61] *Van Heerden* v. *Marais*, 6 Buch. 100.

previous to the payment, and has not been withdrawn, the creditor will be justified in acting upon it, and, if he does so, there will be no necessity for any declaration on his part.[62]

An appropriation may be either express or implied.[63] Thus, where a debtor, who was indebted both on a mortgage bond and also on other accounts, made a payment of a certain amount without making any appropriation, and the creditor thereupon wrote a receipt for the amount upon the bond, this was held to amount to an appropriation in reduction of the bond.[64] If, also, the course of dealing between the parties has been such as to lead the creditor to the reasonable belief that any particular payment would be regarded as appropriated in a particular manner, the debtor cannot afterwards claim that the appropriation shall be altered and made according to general legal principles.[65]

It is not, however, entirely at the discretion of either party to make an appropriation in any way he pleases. Thus, a creditor may not appropriate a payment in settlement of a disputed or uncertain debt, nor of a debt which is not yet due, or merely a suretyship debt, or which is not legally claimable.[66] On the other hand, a creditor is not bound to allow an appropriation towards the payment of a debt in a form in which he could not have been compelled to accept such payment, —thus, a creditor on an ordinary mortgage bond is not bound to receive part payment of the capital secured by the bond, and, therefore, is not obliged to consent to the appropriation of a payment by a debtor, who is

[62] *Stiglingh* v. *French*, 9 S. C. 411.
[63] *Ibid.*, p. 406.
[64] *In re Roberts*, 9 S. C. 188.
[65] *Stiglingh* v. *French*, 9 S. C. 411.
[66] *Jefferson* v. *De Morgan*, 2 E. D. C. 213; Voet, 46 : 3 : 16; G. 3 : 39 : 15.

in arrear with his interest, to part payment of the capital rather than to the interest.[67]

If no appropriation has been made by either party at the time of the payment, neither of them can be compelled to submit to an appropriation subsequently made, but certain general legal principles will then come into play, and the law itself then steps in and makes the appropriation in accordance with certain general rules which have been adopted in course of time by custom.[68] According to these rules, a payment is regarded as received in settlement of that debt which it is most to the interest of the debtor to have discharged,[69] and therefore first to the payment of interest and only in the second place to the settlement of the principal sum.[70]

If there are several principal debts, the payment is regarded as made in settlement of the debt which is actually due in preference to one which is not yet due. If all are due at the time of the payment, it must be appropriated in settlement of the most burdensome, such as a debt which, if not paid by a particular date, will make the debtor liable to a penalty or to the payment of interest or which is secured by sureties or by a mortgage.[71]

A payment is also presumed to have been made in settlement of a debt due by the debtor himself rather than that of another, and consequently in settlement of a debt due by him as principal rather than of one for which he is liable as surety only,

[67] *Brink, N. O.* v. *The Sheriff and others*, 12 S. C. 420.

[68] *Siglingh* v. *French*, 9 S. C. 411; *Brink, N. O.* v. *The Sheriff and others*, 12 S. C. 420; Voet, 46 : 3 : 16; V. D. L., p. 267.

[69] *Scott* v. *Sytner*, 9 S. C. 53; V. D. L., p. 267.

[70] *Brink, N. O.* v. *The Sheriff and others*, 12 S. C. 420; Voet, 46 : 3 : 16; V. D. L., p. 268.

[71] *Norden* v. *Solomon*, *q.q.*, 2 Menzies, 377; Voet, 46 : 3 : 16; G. 3 : 39 : 15.

even though the suretyship debt may be the older.[72]

If all the debts are equally burdensome, and either all due by the debtor himself or all suretyship debts, the payment must be appropriated to the oldest.[73] If all are equally old, it is appropriated to all proportionately.[74]

If a payment is made to a person to whom one debt is due as a principal creditor and another as agent for a third party, a payment made to him without any appropriation will be presumed to have been received by him in settlement of his own debt rather than that of the third party.[75]

The effect of a valid and complete payment or fulfilment is to release not only the debtor who makes the payment, but also his co-debtors and sureties, if any, and also to extinguish all mortgages or pledges given in security of such fulfilment.[76]

A creditor is also bound, upon payment, to give the debtor a receipt for the money paid and to return to him any acknowledgment of the debt he may have received from him.[77]

If, upon a debtor offering to pay a debt, a dispute arises between him and the creditor as to the amount of such debt, the debtor, if he wishes to protect himself from liability for the costs of any action which may subsequently be brought against him and from any other consequences of not having paid the debt at the due time and place, will have to make a

[72] Voet, 46 : 3 : 16.

[73] *Scott* v. *Sytner*, 9 S. C. 53; *Heydenrych* v. *Mackie, Young & Co., and the Standard Bank*, 2 Buch. App. C. 291; Voet, 46 : 3 : 16.

[74] Voet, 46 : 3 : 16; G. 3 : 39 : 15; V. D. L., p. 267.

[75] Voet, 46 : 3 : 16.

[76] Voet, 46 : 3 : 13; V. D. L., pp. 266 and 267.

[77] *Van Noorden* v. *De Jongh and Hofmeyr*, 9 S. C. 296; Voet, 46 : 3 : 15.

tender of the sum he admits to be due and owing by him.

Such a tender, in order to be completely effective, will have to be made to a person who is competent and authorized to receive payment, and must be clear and unqualified and unconditional,[78] and in strict conformity with the terms of the original contract.[79]

A tender of money, it has been decided, may validly be made by a telegraphic money order.[80]

A tender made to the creditor himself will be good, though he may have placed the case in the hands of an attorney.[81]

A tender must be made before summons, and, if so made, need not include the costs of a letter of demand or the costs of collection charged by the plaintiff's attorney.[82] If made after summons, it will have to include all costs up to date which are legally chargeable against him;[83] but where the summons has not been preceded by a letter of demand, and the defendant tenders payment immediately upon service of summons, he will not only not be liable to any costs, but will be entitled to claim costs against plaintiff.[84]

Where there has been no tender at all, the defendant will be liable to costs as a matter of course, unless indeed the plaintiff is under an obligation to render the defendant a detailed and correct account of his

[78] *Van der Spuy* v. *Colonial Government*, 19 S. C. 413; *African Agricultural and Finance Corporation* v. *Bouguenon*, (1904) T. S. 535; *Li Kui Yu* v. *Jamieson*, (1906) T. S. 470.

[79] *Stewart* v. *Ryall*, 5 S. C. 156.

[80] *Smuts* v. *Poole*, 22 S. C. 286.

[81] *Walker* v. *Greeff*, 5 E. D. C. 87.

[82] *Michau* v. *Ashe*, 19 S. C. 517; *Walker* v. *Greeff*, 5 E. D. C. 87; *Smith and Petrie* v. *Van der Merwe*, (1904) T. S. 777.

[83] *Fouché* v. *Knibbs*, 5 S. C. 197; *Le Grange* v. *De Beer*, 2 Off. Rep. 139; *Gauf* v. *Rothschild*, 3 Off. Rep. 113.

[84] *Agulhas* v. *Dix and Hahn*, (1905) T. S. 292; *Van der Berg* v. *Van Tonder*, 16 S. C. 509; *Brink* v. *Gough*, 2 Menzies, 256; V. D. L., p. 395.

claim and has failed to do so, either in his declaration or otherwise.[85]

As long as a tender is not accepted, it may at any time be withdrawn, and will not estop the defendant from denying his liability, if an action for fulfilment should afterwards be brought against him.[86]

The effect of a tender, though it will not release a debtor from the necessity of making payment or fulfilment, if subsequently called upon to do so, is to release the debtor from all the consequences which would otherwise have arisen from his omission to make such payment or fulfilment,[87] such as the payment of a penalty stipulated in case of non-fulfilment,[88] or the liability for interest,[89] as also liability for the destruction of a thing which it was his duty to deliver, and which perishes after tender without any fault or neglect on his part,[90] and liability for the costs of any action which may subsequently be instituted against him for the recovery of the thing or debt.[91] An insufficient tender will not, however, have the same effect.[92]

The right to a tender may be waived by a creditor, either expressly or tacitly; and consequently where a plaintiff sues for a certain amount of which only a portion is admitted by the defendant, and the plaintiff either in express words or by his conduct intimates to the defendant that he will not in any case accept less than the amount demanded, this will be regarded as a waiver of tender, and will free the defendant from costs in case judgment is ultimately given against him

[85] *Williamson* v. *Burke*, (1906) E. D. C. 130.

[86] *Van der Spuy* v. *Colonial Government*, 14 S. C. 410; *Fothergill* v. *South African Breweries*, 17 S. C. 409.

[87] Voet, 46 : 3 : 17.

[88] Voet, 46 : 2 : 29.

[89] Voet, 22 : 1 : 17.

[90] Voet, 46 : 3 : 28.

[91] Voet, 5 : 1 : 25.

[92] *Michau* v. *Ashe*, 19 S. C. 517; *Wienand* v. *Theron*, 6 E. D. C. 250.

for the amount he was ready and willing to tender only.[93]

Where an action has already been begun for the recovery of a debt or other amount alleged to be due, and the defendant, whilst admitting that he owes something, is not prepared to confess to the whole amount claimed, it will be open to him at any time after the service of the summons, and before or at the time of the service of a copy of his plea or answer, or by leave of the Court or a judge at any later time, to pay into Court what he admits to be due or is prepared to pay.[94] A defendant cannot, however, as a rule be compelled to pay into Court the amount he admits to be due, though there may be special circumstances under which the Court will assist the plaintiff, where it appears that certain moneys are admitted to be due, and where it would be only just that money which has been tendered and admitted to be due, should be secured.[95]

In addition to payment into Court the Roman-Dutch law recognized a mode of payment or tender which consisted in the sealing up (*consignatio*) of the thing which the defendant has tendered and is prepared to deliver in fulfilment of his obligation, but which the plaintiff has refused to accept, and the placing it in safe deposit at the risk of the plaintiff.[96] Such a tender and deposit were regarded as equivalent to actual payment, provided the tender was made at the due time and place and in conformity with the

[93] *Laubscher* v. *Vigors and Fryer*, 3 Buch. 104; *Joel* v. *Dolman*, 6, S. C. 145; *Fraustaeder* v. *Sauer and another*, 9 S. C. 512: *Van Diggelen* v. *Leyds*, Barber's Gold Law (1896), p. 26.

[94] Rule of Court 332. See also G. 3 : 40 : 2; V. L., vol. 2, p. 80.

[95] *Allie Brothers* v. *Parker and another*, 20 S. C. 634.

[96] Voet, 46 : 3 : 17; V. D. L., pp. 224 and 268.

terms of the obligation, and had the effect of transferring the risk of the thing deposited from the debtor to the creditor.[97]

In the case of such a deposit there was nothing to prevent the debtor from redeeming the thing deposited so long as it had not been accepted by the creditor, and, when this was done, matters were restored to their original condition, just as if no deposit had ever been made, except that the withdrawal did not affect the position of third parties, such as sureties and persons who had given pledges or mortgages in security of the obligation, and who had been released by reason of the tender and deposit.[98]

This practice has fallen into disuse amongst us, apparently because it is unnecessarily cumbersome and because a formal tender and notice to the creditor that the thing will in future be held at his risk will have the same effect as regards the risks of the property as an actual *consignatio* and deposit. Whether the same rules which applied to the latter will apply also in all respects to payment into Court is not quite clear. It is not quite clear, for instance, whether a defendant who has paid money into Court may withdraw it again before it has been accepted by the plaintiff, but it is submitted that this can at any rate not be done without an order of Court.

Money paid into Court may, unless it has been otherwise ordered by a judge in consequence of special circumstances, be paid out by the Registrar of the Court to the plaintiff or to his attorney upon his written authority.[99] Consequently, where in a simple action for goods sold and delivered the defendant paid

[97] Voet, 46 : 3 : 29; V. D. L., p. 268.

[98] Voet, 46 : 3 : 29.

[99] Rule of Court, 332. See also V. L., vol. 2, p. 80, § 3.

a sum of money into Court in settlement of the purchase price of a portion of the goods, which he admitted to have received, and pleaded over as to the remainder of the goods, it was held that the plaintiff, in the absence of special cause to the contrary, was entitled to have the money paid over to him, notwithstanding that he did not accept the amount in full settlement of his claim and although the defendant had requested the Registrar not to pay it over.[100] But it would be different where the articles admitted to have been received and those denied are not clearly separable, as in the case of a claim for professional services rendered, in which there can seldom be any items or special pieces of work which can be separately and specifically denied, and in which a partial denial therefore goes to the whole gist of the case. In such a case the plaintiff will not be entitled to have the money paid over to him, unless he accepts it in full settlement.[101]

A payment into Court is regarded as equivalent to payment to the plaintiff himself, if judgment is afterwards given in his favour.[102] Consequently, where a defendant had made a payment into Court, but afterwards became insolvent after judgment had been given against him, but before the money had been paid over to the plaintiff, it was decided that such money belonged to the plaintiff, and not to the defendant's insolvent estate.[103] But there is nothing to prevent a defendant, after making a tender and a payment into Court, from denying his liability altogether.[104]

[100] *Hughes and Rogers* v. *White, Ryan & Co.*, 17 S. C. 88.

[101] *Baker and Masey* v. *Robinson*, 25 S. C. 84.

[102] Voet, 46 : 3 : 17 and 29; G. 3 : 40 : 3; V. L., vol. 2, pp. 80 and 335; Dekker's note (*d*) to V. L., vol. 2, p. 81; V. D. L., p. 268.

[103] *Trustees of De Roubaix* v. *Breda's Curator*, 6 Buch. 196.

[104] *Van der Spuy* v. *Colonial Government*, 15 S. C. 410.

A payment into Court may sometimes be ordered by the Court or a judge,[105] and the Court will also sometimes appoint a receiver or stakeholder.[106]

If in an action of debt the defence is that the money has been already paid, such payment must be specially pleaded,[107] and so also must tender and payment into Court.[108]

Under our old Rules of Court it was not competent for a defendant to plead a tender together with the general issue denying the debt, and exceptions to such pleas on the ground of inconsistency used to be allowed;[109] but under the new Rules this is no longer the case,[110] and where, in addition to a tender, there has been a payment into Court, there is nothing to prevent the defendant, in case his tender is not accepted, from denying his liability altogether.[111]

A payment may be proved by a receipt[112] or other documentary evidence or by witnesses,[113] or by inference from the circumstances, as where a person, who is bound to make certain periodical payments, produces receipts for three consecutive periods, in which case he is presumed to have duly made all previous payments, unless the contrary be clearly proved.[114]

The accuracy of a receipt may be impugned, but under Roman-Dutch law the right to impugn it was limited to thirty days.[115] As a general rule, however,

[105] Rule 332; V. L., vol. 2, p. 80, §§ 4, 5 and 6.

[106] V. L., vol. 2, p. 80, §§ 5 and 6; Dekker's note (*d*) to V. L., vol. 2, p. 81; V. D. L., p. 268.

[107] *O'Rielly* v. *Leathern*, Kotze 62.

[108] Rule 332.

[109] *Primmer* v. *Mollett*, 2 S. A. R. 10.

[110] Rules 330 and 332.

[111] *Van der Spuy* v. *Colonial Government*, 14 S. C. 410.

[112] Schorer, Note 496.

[113] Voet, 46 : 3 : 15; V. L., vol. 2, p. 331.

[114] Voet, 46 : 3 : 14.

[115] Voet, 46 : 3 : 15; Schorer, Note 321 *in fine*.

the accuracy of the contents of a document, the execution or writing of which is admitted, will be presumed until the contrary be proved.[116]

Payment will also be presumed from the fact that the written obligation or acknowledgment of debt has been handed back to the debtor and is in his possession, unless the creditor can prove the contrary.[117] The mere fact that such document is found torn, erased, or cancelled in the possession of the debtor will not be conclusive proof of payment, seeing that it may have got there without the knowledge of the creditor, it having been lost by or stolen from him.[118] Evidence will be required to prove that the document was voluntarily handed back by the creditor to the debtor.[119]

A double payment will also be presumed from the production by the debtor of two receipts for the same debt, bearing different dates;[120] but in this case the creditor will be entitled to dispute one of the receipts, even after the lapse of thirty years, by proving that no payment had actually been made thereon.[121]

CHAPTER II.

FICTITIOUS FULFILMENT—PRESCRIPTION.

FICTITIOUS fulfilment takes place, as already stated, wherever a state of facts supervenes which in the eye of the law is regarded as equivalent to payment.[1] This

[116] Voet, 22 : 4 : 11; G. 3 : 5 : 4; Schorer, Note 323.
[117] V. L., vol. 2, p. 331.
[118] Voet, 46 : 3 : 15; V. L., vol. 2, p. 331.
[119] Dekker's note (*g*) to V. L., vol. 2, p. 333.
[120] Schorer, Note 460; Voet, 12 : 6 : 14.
[121] Voet, 12 : 6 : 14 *in fine*.
[1] Voet, 46 : 3 : 1 and 17.

may take place either with or without the active intervention of the parties. Without the intervention of the parties the dissolution of an obligation may take place through the destruction of a thing or by prescription. The former occurs where the delivery and therefore the continued existence of a particular corporeal thing is essential to the fulfilment of a contract, and the thing has perished or been destroyed by accident or at any rate without any fault or negligence on the part of the obligor or person who is responsible for such fulfilment.[2] We have already dealt sufficiently with this subject when treating of specific contracts, such as *depositum*, *commodatum* and letting and hiring,[3] and it is therefore not necessary to enlarge upon it any further here.

The same effect as that caused by the destruction of a thing may be produced by an Act of the Legislature, which renders it impossible for the obligor to carry out his contract.[4]

Proceeding to deal with the more important and difficult subject of prescription, we may point out that we have already treated of prescription as a mode of acquiring or losing ownership and real rights to property,[5] and we have here only to deal with it as a mode of losing rights of personal action.

In this connection prescription is that mode of extinction of obligations which is brought about by the mere lapse of a certain period of time, fixed by law and called the period of prescription, without the debtor

[2] *Witwatersrand Township, Estate and Finance Corporation* v. *Rand Water Board*, (1907) T. S. 231; Voet, 45 : 1 : 24; 46 : 3 : 17; V. D. L., p. 273.

[3] See Vol. iii., pp. 107, 114 and 214.

[4] *Witwatersrand Township, Estate and Finance Corporation* v. *Rand Water Board*, (1907) T. S. 231.

[5] See Vol. ii., pp. 78 and 206.

having been summoned for the debt or having in any way acknowledged his liability for the same.[6]

The period allowed for the prescription of rights of action varies in different countries, and when this is the case as between the domicile of the creditor and that of the debtor, it may be laid down that the law of the domicile of the debtor will have to be observed, unless indeed the obligation to be prescribed has reference to immovable property, in which case the law of the country where such property is situate (*lex loci rei sitæ*) will have to prevail.[7]

The period of prescription differs also with respect to different obligations, but it may be laid down as a general rule that, whenever no special period of prescription is fixed by statute or by the common law with respect to any particular obligation, the period of prescription for all personal obligations is thirty years, though some writers have been of opinion that the correct period is the third of a century.[8] This period, whether it is taken at thirty years or at the third of a century, is the longest period known to our law with a few exceptions, in which it is fixed at forty years. Thus whilst a general mortgage bond becomes prescribed in thirty years,[9] a special hypothec or mortgage on immovable property requires forty years for the purposes of prescription.[10]

[6] Voet, 44 : 3 : 10; G. 3 : 46 : 1 Schorer, Note 515.

[7] Voet, 44 : 3 : 12. See also vol. ii., p. 80.

[8] *Blignaut's Trustee* v. *Cellier's Executors and others*, 1 Buch. 209; *Estate of Lloyd* v. *Galpin*, 21 S. C. 55; Voet, 44 : 3 : 8; G. 3 : 46 : 3, and Groenewegen's footnote 8 thereto; Schorer, Note 515; V. L., vol. 2, p. 334, § 8; Groen., De Leg., C. 7 : 39 : pr.; V. D. L., p. 274; Bynkershoek, Quæst. Jur. Priv., lib. 2, cap. 13.

[9] *Peach & Co.* v. *Simon's Trustee*, 13 S. C. 56.

[10] *Executors of Schomberg* v. *Executors of Vos*, 1 S. C. 325, G. 2 : 48 : 44; V. D. K., Th. 442, 443; Groen., De Leg., C. 7 : 39 : pr. and 7; V. L., C. F., part 1 : 2 : 10 : 19.

Claims to money which has been placed in the Wards' Book in the Master's Office to the credit of any person or estate become prescribed if such money remains unclaimed for a period of forty years from the date of such entry, and the money becomes forfeited to the Crown.[11]

Judgments of the Court become completely prescribed in thirty years,[12] but they become superannuated or incapable of execution after the lapse of six years, after which they will require to be revived if it is intended to take out execution upon them.[13] This rule as to superannuation, however, having been introduced for the benefit of the defendant, the right of the benefit thereof may be waived or renounced by him, either expressly or by conduct.[14]

Actions upon bills of exchange, promissory notes or other liquid documents of debt of such a nature as to be capable of being sued upon provisionally (but not being a mortgage bond or the judgment of a Court) will be prescribed after the expiration of eight years from the time when the cause of action first accrued,[15] and this rule will apply even to a promissory note made by a foreigner in a foreign country.[16]

The same period of prescription obtains also in actions for money due for goods sold and delivered, for money lent by plaintiff to defendant, for money paid by plaintiff for the use of the defendant, for money had and received by the defendant for the use of

[11] Ord. 105, 1833, sec. 36.

[12] Voet, 42 : 1 : 47.

[13] Rule of Court, 370; *Rabinowitz*, v. *Lavinburg*, 4 S. C. 358. See also *Meyer* v. *Pohl*, 1 Menzies, 498 : *Thomson & Co.* v. *De Kock*, *Ibid.* 81; *Buck* v. *Barker*, *Ibid.* 82; *Brink* v. *De Lima*, 3 Menzies, 304; *Orphan Chamber* v. *Strydom*, 3 Menzies, 417; V. D. L., p. 424.

[14] *Bank of Africa* v. *Kimberley Mining Board*, 2 Buch. App. C. 6.

[15] Act 6, 1861, sec. 2; *Paterson* v. *Umzinso Sugar Co.*, 8 Buch. 147 and 3 Roscoe, 64; *Barkhuysen* v. *Van Heysten*, 1 S. C. 26.

[16] *Louw* v. *Skead*, 4 S. C. 109.

the plaintiff[17] (including the *condictio indebiti*),[18] for rent due upon any lease or contract for hire, for money claimed upon or by virtue of an admission of an amount due upon an account stated and settled, for money due upon an award of arbitrators, for money due as the purchase money of fixed property, for money claimed for work and labour done and materials for the same provided, and for money claimed upon or by virtue of any policy of assurance.[19]

A prescription of three years applies to actions for the fees or for the fees and disbursements of advocates, attorneys, notaries public, conveyancers, land surveyors, or persons practising any branch of the medical profession, or for the amount of any baker's or butcher's or dressmaker's, or wholesale or retail[20] boot or shoemaker's, bill or account, or for the salary or wages of any merchant's clerk, or other person employed in any merchant's or dealer's store, counting-house or shop, or for the wages as a servant of any person coming under the definition of the term "servant" given in Act 15, 1856,[21] such period of prescription being calculated from the date when the cause of action first accrued.[22] This provision of Act 6, 1861, does not, however, apply to the fees of law agents.[23]

An attorney's right of action against his client for the costs of a successful action conducted by him will not accrue until the completion of the work connected

[17] *Colonial Government* v. *Southey and others*, 6 Buch. 140.

[18] *Liquidators of the Paarl Bank* v. *Roux and others*, 8 S. C. 205; *Liquidators of the Paarl Bank* v. *Le Roux's Executors*, 9 S. C. 286.

[19] Act 6, 1861. sec. 3.

[20] *Drummond* v. *Brown*, 4 S. C. 281.

[21] Act 6, 1861, sec. 5.

[22] Act 6, 1861, sec. 5. See also *Drew* v. *Executors of Wolf*, 1 Buch. 119; *Little* v. *Rothman*, 2 Off. Rep. 197; *Peycke & Co.* v. *Estate of Baumann*, (1905) T. S. 70; Voet, 44 : 3 : 7; G. 3 : 46 : 7; V. D. K., Th. 876; V. L., C. F., part 1 : 2 : 10 : 18.

[23] *Hutchens* v. *Muller*, 2 S. C. 75. But see *Van Diggelen* v. *Wepener*, 1 Off. Rep. 31.

with the action, the work not being regarded as completed until the attorney has sued out a writ of execution upon the judgment, or until the client has withdrawn the attorney's power to act, whichever of these two events may take place first. When the attorney's power has not been withdrawn and an appeal has been noted, the attorney's right of action will not accrue until the giving of final judgment by the Court of Appeal.[24]

Certain other lesser periods of prescription were recognized in the law of Holland, such as the prescription of two years in the case of actions for the purchase price of goods sold by retail for consumption (*goederen ter slete geleverd*), which has been applied in some few cases in the Transvaal.[25]

Actions for *restitutio in integrum* were under Roman law prescribed in four years,[26] but under our common law the period of prescription is thirty years, except in the case of minority, with respect to which it is still limited to four years.[27]

Actions of damages for real injuries or wrongs are prescribed, as has been already pointed out, in thirty years, but actions of damages for defamation require only one year.[28]

In cases of damage sustained by reason of default or neglect on the part of a Divisional Council or Municipal Council in connection with any matter relating to the state of the roads, bridges, or streets under its charge, no action will lie unless written

[24] *Bell* v. *Loxton*, 12 E. D. C. 1.

[25] *Loteryman & Co.* v. *Cowie*, (1904) T. S. 599; *Spiller* v. *Mostert*, *Ibid.* 634; *Peycke & Co.* v. *Estate of Baumann*, (1905), T. S. 70; *Lowle* v. *Johnston*, (1907) T. S. 1069. But see *Shepherd* v. *Treeby*, (1908) T. S. 96.

[26] Voet, 44 : 3 : 7; V. L., C. F., part 1 : 2 : 10 : 15. See also vol. iii., p. 59, above.

[27] See Vol. iii., p. 59.

[28] See pp. 25 and 114, above.

notice of the damage, setting forth particulars of the cause of damage, of the damage sustained and of the default or neglect complained of, has been given to such Council within fourteen days. But an extension of time may under certain circumstances be allowed by the Courts.[29] Similarly, no action can be brought against the sheriff or any deputy sheriff for anything done or omitted to be done in the execution of his office, unless commenced within six calendar months after the act committed or omitted to be done[30]; but the same rule does not apply to the Messenger of the Magistrate's Court.[30a]

Any lapse of time short of prescription will have no effect to extinguish any right of action, but the Court may take it into consideration as a matter of evidence, and give to it such weight according to the circumstances of each case as it may think just and reasonable.[31] The antiquity of an acknowledgment of debt, for instance, may raise some presumption in favour of its having been paid, though it may not be conclusive proof of such payment, and it will be one of the ingredients in the evidence which the Court will be bound to take into consideration in deciding upon a defence of payment.[32]

As regards what does and what does not amount to an interruption of prescription, it has been provided by Act 6, 1861, that the question of the effect of any acknowledgment of debt, or any promise to pay any debt, or any payment of interest on any debt, or any part payment of the principal of any debt made

[29] Act 27, 1894, sec. 2; *Hildebrand* v. *King Williamstown Divisional Council*, 16 S. C. 402.

[30] Act 17, 1886, sec. 8.

[30a] *Beckman* v. *Groenewald*, 25 S. C. 689.

[31] Act 6, 1861, sec. 13.

[32] *Executors of Schomberg* v. *Executors of Vos*, 1 S. C. 330.

by any person, whether the person sought to be charged in any such suit or action or not, in taking any cause of action out of the operation of that Act, will have to be decided according to the rules and principles obtaining in the Courts at Westminster.[33] But the law previously obtaining in the Cape Colony relative to the effect of a judicial interpellation by the creditor of his debtor in staying or interrupting the course of any uncompleted term or period of prescription, remains unaltered by the provisions of Act 6, 1861, and is in fact made applicable to the periods of prescription established by that Act.[34]

No endorsement or memorandum of any payment written or made upon any promissory note, bill of exchange, or other liquid document, by or on behalf of *the party to whom payment is made*, will be sufficient proof of such payment, so as to take the case out of the operation of the Act,[35] but an unqualified written acknowledgment of debt and promise to pay will.[36] An acknowledgment of a debt, however, will not take the case out of the operation of the Act, unless made in some writing signed by the party chargeable thereby.[37]

By the law of England, which is the law of the Cape Colony in this respect, where a payment is made in respect of a principal sum, the effect of it will be to take out of the statute any debt which is not already barred by prescription at the time of the payment, but it will not revive a debt which is already completely barred; and exactly the same principle applies where the payment is made in respect of interest.[38]

[33] Act 6, 1861, sec. 8.
[34] Act 6, 1861, sec. 7.
[35] Act 6, 1861, sec. 9.
[36] *Dittmer* v. *Fryer*, 16 S. C. 473; *Strydom's Curator* v. *Jacobs' Executor*, 11 S. C. 222.
[37] *Bell and Moore* v. *Swart*, 16 S. C. 404; Lord Tenterden's Act, sec. 1. But see *Lubbers and Canisius* v. *Lazarus*, (1907) T. S. 901.
[38] *Nash* v. *Hodgson*, 6 De G., M. & G. 474; *Bell and Moore* v. *Swart*,

The sequestration of the debtor's estate will not interrupt the running of prescription against a creditor who has not proved his debt on the estate; but proof of such debt will be a sufficient judicial interpellation to interrupt prescription.[39]

If at the time when a cause of action accrues the debtor is absent from the country, the period of prescription will begin to run from the date of his return.[40] This, however, will not apply to the case of a foreign debtor, whose debt was incurred outside the Colony. In such a case, prescription will begin to run from the date of the accrual of the cause of action.[41] Nor, apparently, does sec. 11 of Act 6, 1861, apply to the case of a debtor who leaves the Colony after the cause of action has accrued.[42]

Prescription is, as a general rule, pleadable against all persons whomsoever, and as regards all kinds of obligation whatsoever, who or which are not specially exempted or excepted. It will run even against the Crown at any rate as regards obligations which are due to the Crown as a private individual, but not as regards obligations which are due to the State as a state, or as a matter of prerogative. Thus, while debts due to the State will become prescribed in the same time as those due to private individuals, the liability to pay taxes can never be prescribed—in other words, exemption from the liability to pay taxes can never be acquired by prescription.[43] On the other hand, overdue taxes will become prescribed, they being

16 S. C. 404; *Maduna* v. *Goetsch*, 23 S. C. 621. But see *Lubbers and Canisius* v. *Lazarus*, (1907) T. S. 901.

[39] *Naude's Executor* v. *Maritz, Hall and Naudé's Trustee*, 19 S.C. 171.

[40] Act 6, 1861, secs. 11 and 12.

[41] *Louw* v. *Skead*, 4 S. C. 109.

[42] *Barkhuysen* v. *Van Huysteen*, 1 S. C. 26.

[43] Voet, 44 : 3 : 11.

in the position of debts due by the taxpayer to the State.[44]

In a similar way, the liability to pay an annuity can never be prescribed, but overdue annual payments may.[45]

Prescription cannot be pleaded against a claim in reconvention which is capable of being set off against the claim in convention, such set-off taking effect *ipso jure*, and acting as a payment from the time of the mutuality of debts coming into existence.[46]

The prescription of actions is based upon the principle that penalties should be imposed upon creditors who, through their negligence and carelessness about their own affairs, allow their claims for debts due to them to run into arrear, with the result of a multiplicity of actions and a difficulty on the part of debtors of proving payments after an undue and unnecessary lapse of time.[47] The basis of the law with respect to prescription, then, being negligence, and there being no possibility of negligence on the part of a person who is unable to sue, it has been laid down that prescription will not run against creditors who are unable, owing either to some legal or some physical obstacle, or in consequence of the terms of a testator's will, to bring an action.[48] It will not, therefore, begin to run against a minor or a married woman who is under the marital control of her husband, nor against a person who is of unsound mind or absent from the

[44] Voet, 44 : 3 : 11.

[45] Voet, 44 : 3 : 11; V. D. K., Th. 875; Schorer, Note 517; Groenewegen's footnote 11 to G. 3 : 46 : 5; Groen., De Leg., C. 7 : 39 : 7 : 6. But see G. 3 : 46 : 5; V. D. L., p. 275.

[46] *Binase* v. *Maklutshana*, 24 S. C. 452.

[47] Voet, 41 : 3 : 1.

[48] Voet, 44 : 3 : 11; G. 3 : 16 : 4; Schorer, Note 516; V. L., C. F., part 1 : 2 : 10 : 22, *in fine*. But see De Villiers, C.J., in *Naudé's Executor* v. *Maritz, Hall and Naudé's Trustees*, 19 S. C. 174.

country, until he or she has been released from the inability to sue which is due to such minority, marital power, unsoundness of mind, or absence. Consequently, the right of such person, or of his or her executor, to sue will not become prescribed until a period of time equal to the period of prescription has expired after the disability in question has ceased, or after the death of such creditor, whichever of these events shall first happen.[49]

In all other cases the prescription will begin to run as soon as the cause of action arises. Thus, in the case of an attorney's claim for his costs, it will begin to run from the date of the judgment in the case for which the costs are due, unless his services have been sooner dispensed with, in which case it will begin to run from such latter date.[50]

Under the Roman law the extinction of obligations by prescription did not take place *ipso jure*; prescription merely afforded a ground of exception to an action based upon the obligation. In the Netherlands, however, according to Voet and Grotius, it was the custom from times of old for obligations to be extinguished *ipso jure* by mere lapse of time, and such prescription was regarded as equivalent to payment.[51] But, as pointed out by Van der Keessel,[52] this view is not free from difficulties, for if prescription is equivalent to payment in all respects, then immediately upon the expiration of the period of prescription, any suretyship entered into, or any mortgages granted in security of an obligation would immediately become released, but this is not the case. The rule laid down by Voet and

[49] Act 6, 1861, sec. 6. See also Voet, 44 : 3 : 9, *in fine*; G. 3 : 46 : 4; Schorer, Note 516; R. Obs., part 2, obs. 98.

[50] *Walker* v. *Fenele*, 19 S. C. 464.

[51] Voet, 44 : 3 : 10; G. 3 : 46 : 2; R. Obs., vol. 2, obs. 97.

[52] V. D. K., Th. 874.

Grotius will therefore have to be accepted with limitations. As regards sureties and mortgages, Voet lays it down that no sureties and mortgages can as a general rule be given in security for a debt which has been already prescribed. This, however, can only apply to the case of a surety or mortgagor who was not aware at the date of the execution of the suretyship or mortgage that the debt had already become prescribed,[53] for there would be nothing to prevent a surety or mortgagor with knowledge of the facts from making himself liable for the payment of the debt in any event.[54]

As regards suretyships for an existing debt, we submit that they do not become *ipso jure* extinguished by the lapse of the period of prescription with regard to the principal debt. They will only become extinguished if the defence of prescription has been upheld by the Court in an action brought for the recovery of the principal debt.

As regards mortgages given in security of an existing obligation, their effect to continue such obligation and keep it in existence beyond the period of prescription will to a great extent depend upon the terms of the bond itself. Where the original debtor is himself the mortgagor, it may be laid down that the mortgage would act as a *novatio* of the original obligation, and act as an extension of the period of prescription to the period required to prescribe the bond debt.[55]

The more correct view, therefore, is that prescription merely affords a ground of defence or exception to an action, and does not act as an extinguishment of

[53] D. 46 : 1 : 37.
[54] D. 13 : 5 : 18 : 1.
[55] *Peach & Co.* v. *Simon's Trustee* 13 S. C. 53; Voet, 20 : 1 : 19.

the obligation *ipso jure*.[56] This view is also supported by the wording of Act 6, 1861, which states that no action shall be capable of being brought when the period of prescription has expired. But when the defence of prescription has by judgment of the Court been declared to be well founded, it will be regarded as having taken effect retrospectively upon the date when the period of prescription expired, so as to stop the running of interest and any other consequences attaching to the prescribed obligation itself. Where an action, for instance, is brought upon an account consisting of several items, prescription may effect some of them and not others,[57] and, if these items bear interest, it will stop the running of interest as regards those which are prescribed, and not with reference to the others.

Prescription is as a general rule taken advantage of or enforced by way of a plea in abatement to an action based upon the obligation, but there is nothing to prevent its being established by way of an action to have the obligation declared prescribed.[58]

CHAPTER III.

DISSOLUTION OF OBLIGATIONS WITH THE INTERVENTION OF THE PARTIES.

We come now to that form of dissolution of obligations which takes place with the intervention of the parties. Such dissolution may take place in one or other of two ways, that is to say, either by contracts

[56] Voet, 46 : 3 : 17 ; G. 3 : 39 : 2.
[57] Act 6, 1861, sec. 10.
[58] Groen., De Leg., 7 : 39 : 8 : 1.

or agreements entered into with the express purpose of doing away with the necessity of fulfilling or carrying out the obligation or by contracts or agreements concluded without such express intent, but which yet have the effect of annulling the original obligation. Amongst the former class may be mentioned the rescission of contracts by mutual consent, voluntary release or discharge of the debtor by the creditor, *pactum de non petendo*, *novatio* and arbitration, and amongst the latter set-off or *compensatio*.[1] To these may be added the case where an obligation is either suspended or terminated by the action of one of the parties alone with the assistance of the Court, as where an action for the fulfilment of an obligation is instituted by one of the parties, or where judgment has been obtained by him and duly carried into execution. In the former of these cases the defendant will be entitled to the defence of *lis pendens*, and in the latter to the defence of *res judicata*, if sued upon the same subject-matter in the same or any other Court, in the one case, whilst the case first instituted is still pending, or, in the second case, after it has been duly carried into execution.

We shall first deal with those modes of extinction of obligations which are brought about by express agreement between the parties. These may act as a dissolution of the obligation either absolutely[2] or merely relatively to the original parties to the same, the obligation in the latter case continuing in existence as between other parties who have been introduced into it, as happens in the case of *delegatio* and cession of action.

[1] Voet, 46 : 3 : 1 and 17.

[2] Voet, 46 : 3 : 1 *et seqq.*

An obligation may of course always be extinguished by the rescission of the contract upon which it is based. Such rescission can only take place by mutual consent of the parties to the contract,[3] one of the parties by himself not being entitled to rescind or repudiate a contract unless the other party has, either in express words or by conduct, conveyed his absolute refusal to carry out his part of the same and thus practically given his consent in advance to its cancellation.[4]

Rescission will not be allowed where a third party may be prejudiced thereby, he having acquired some right under such contract or by reason of its having been entered into.[5]

An obligation may be extinguished also by the creditor granting the debtor a gratuitous release or dispensation with performance by way of gift or out of mere liberality,[6] or by his entering into an agreement not to sue (*pactum de non petendo*), either for a limited time or absolutely. Under the Roman law there was a wide difference between these two modes of extinguishing an obligation, both as to the manner in which they were effected and as to their consequences. The former, for instance, required that every contract should be dissolved in exactly the same way in which it had been originally concluded. Thus an obligation arising out of a *stipulatio* or contract concluded verbally by the use by the parties reciprocally of certain set phrases,[7] could only be

[3] Voet, 46 : 3 : 17; V. D. K., Th. 833. See also vol. iii., p. 196.

[4] *Attwell & Co.* v. *Logan*, 3 S. C. 107; *Rand Central Ore Reduction Co.* v. *Aurora West Gold Mining Co.*, 1 Off. Rep. 54. See also vol. iii., p. 196.

[5] *Ex parte Friedlander Brothers*, 24 S.C. 454; Voet, 23 : 2 : 113. See also vol. iii., p. 196.

[6] G. 3 : 41 : 5 and 6; V. L., vol. 2, p. 333; V. D. L., p. 269.

[7] See Vol. iii., p. 4.

released or discharged by an *acceptilatio* which consisted in the verbal dissolution of the contract by the use of equally set phrases. With us, however, there is no difference between release and an agreement not to sue or *pactum de non petendo*, both being equally effective to extinguish the original obligation in whatever manner contracted.[8] Either of them also may be effected in any words whatsoever which will convey the intention of renouncing one's rights under the obligation and of dispensing with the fulfilment thereof, provided that the release has been accepted by the debtor or by some one duly qualified on his behalf,[9] and has been granted by some one who is *sui juris* or legally competent to manage his own affairs.[10]

Such release may be granted not only in express terms, but may also be gathered by way of implication from the conduct of the creditor, such as from the fact of his having handed back to the debtor the document containing the proof of the obligation,[11] provided it be proved that this was done voluntarily.[12] The mere restoration of a thing pledged or cancellation of a mortgage given in security of a debt, though it may release the thing or property from the pledge or mortgage, will not necessarily discharge the debt unless such was the intention of the creditor.[13]

A creditor may also waive or dispense with the performance of a particular obligation due to him.[14]

[8] V. L., vol. 2, p. 333, § 7 and Decker's footnote (*g*) thereto.

[9] *Van der Poel's Executors* v. *Malan*, 15 S. C. 70; G. 3 : 41 : 7; Schorer, Note 504.

[10] G. 3 : 41 : 8; V. D. L., p. 270.

[11] Voet, 2 : 14 : 15; 23 : 2 : 85, p. 52; G. 3 : 41 : 10; Schorer, Note 505; V. D. L., p. 269.

[12] Decker's note (*g*) to V. L., vol. 2, p. 333. See also *Orphan Chamber* v. *Aspeling*, 3 Menzies, 414.

[13] Voet, 2 : 14 : 15; V. D. L., p. 270.

[14] *Livingston, Syers & Co.* v. *Dickson, Burnie & Co.*, 2 Menzies, 243; *Myburgh & Co.* v. *Protecteur Fire Assurance Co.*, 8 Buch. 157; *Tier* v. *Tonkin*, 1 Searle, 140.

It is a rule of our law, however, that no one can be presumed to have abandoned any right belonging to him, unless it is clearly proved that at the time of the alleged abandonment he had full knowledge of the existence and nature of his right,[15] and that he deliberately intended to abandon or waive or dispense with the same.[16] A waiver will therefore have to be strictly interpreted in accordance with the words actually used by the creditor.[17]

An agreement not to sue may also be gathered by implication. Thus an agreement not to sue for a certain time for the capital will be presumed from the fact that the creditor has accepted interest for that period in advance.[18]

As regards the extent and scope of a release, it will entirely depend upon the terms in which it is granted and the intention of the creditor. If it is granted in absolute terms, it will release all those liable for the debt, even though granted only to one of several co-debtors or to a surety, but it will have to be clearly proved that such was the intention of the creditor.[19] If the intention was merely to release or to undertake not to sue a particular individual, such as one of several co-debtors, the obligation of the other co-debtors will still continue.[20]

The effect of a release is the same as that of an actual payment, at any rate to this extent, that the release of the principal debtor releases also his sureties,

[15] *Watson* v. *Burchell*, 9 S. C. 5; *Umhlebi* v. *Estate of Umhlebi and Fina Umhlebi*, 19 E. D. C. 246.

[16] *Hiddingh's Executors* v. *Hiddingh's Trustee*, 4 S. C. 204; *Umhlebi* v. *Estate of Umhlebi and Fina Umhlebi*, 19 E. D. C. 246; *De Waard* v. *Kallenbach and Reynolds*, (1907) T. S. 189.

[17] *Heynes, Mathew & Co.* v. *Peacock's Trustees*, 4 S. C. 406.

[18] Voet, 2 : 14 : 15.

[19] G. 3 : 41 : 9; V. D. K., Th. 828; V. D. L., p. 290.

[20] Voet, 2 : 14 : 15; G. 3 : 41 : 9; V. D. K., Th. 828; V. D. L. p. 270.

the obligation of the latter being accessory to that of the former, and expiring with the extinction of the principal obligation.[21]

An agreement not to sue a surety or one of several co-sureties will not release the principal debtor nor the other co-sureties, unless it has been expressly agreed that this shall be the case.[22]

A mere extension of time or agreement not to sue for a certain time will not release sureties or pledges,[23] unless such sureties have bound themselves or the pledges been given for a limited time only.[24]

CHAPTER IV.

NOVATIO.

Novatio is the process by which an existing obligation is extinguished and superseded by a new agreement, which takes the place of the previously existing obligation.[1]

Novatio may take place in one or other of three ways, namely, (1) by replacing the original obligation by another obligation between the same parties; (2) by releasing the original debtor, and placing another debtor in his stead; or (3) by the creditor giving up his rights under the obligation, and making them over to another person who becomes creditor in his stead.[2] The first of these processes is *novatio* properly so

[21] Voet, 2 : 14 : 14; G. 3 : 41 : 9.
[22] Voet, 2 : 14 : 12.
[23] G. 3 : 43 : 4.
[24] Schorer, Note 508; V. D. K., Th. 836.

[1] Voet, 46 : 2 : 2; G. 3 : 43 : 1; V. L., vol. 2, p. 335; V. D. L., p. 268.
[2] V. D. L., p. 268.

called, the second is *delegatio*, and the third is cession of action.

We shall begin with *novatio* proper, which is that form of extinction of obligations which is effected by means of an agreement that the original obligation is to cease to exist, and another between the same parties is to supersede it and take its place.[3]

By our law, differing in that respect from the Roman law, *novatio* may take place not only by express agreement, but also tacitly or by implication, the consent of the parties to the *novatio* being implied from the circumstances and the conduct of the parties. In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another,[4]—in fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation.[5]

A mere agreement that something else than what was originally agreed upon is to be given in fulfilment of a contract, such as sheep instead of the purchase price in a contract of sale, will not amount to *novatio*, the contract of sale remaining in force.[6] Nor will a *novatio* be effected by a mere extension of time for payment allowed by the creditor to the debtor,[7] nor where it has been expressly agreed that there shall be no *novatio*, nor where the new obligation which was intended to supersede the original one is null and

[3] Voet, 46 : 2 : 2.

[4] Voet, 46 : 2 : 3; G. 3 : 43 : 4; Schorer, Note 507; V. D. K., Th. 835.

[5] Voet, 46 : 2 : 3; *Ewers* v. *R. M. Oudtshoorn and another*, Foord, p. 35; *Derkson* v. *Wrensch*, 3 S. C. 162; *Mitchell* v. *Howard, Farrar & Co.*, 5 E. D. C. 146; *Short* v. *Van der Merwe*, (1907) E. D. C. 240; V. D. L., p. 269.

[6] Voet, 46 : 2 : 5.

[7] Voet, 46 : 2 : 6.

void, nor if the *novatio* was a conditional one and the condition fails.[8]

As regards the persons who are competent to enter into a *novatio*, it may be laid down that any person may do so who is not expressly forbidden. Thus even a minor may validly make a *novatio* without the consent of his guardian where he is in the position of debtor, because by this means the original agreement is extinguished, whilst no action will lie against him on the new agreement, on the ground that it has been entered into without the guardian's consent. It is different where the minor is the creditor, in which case he cannot make a valid *novatio* without his guardian's consent.[9]

Every obligation may be the subject of a *novatio*, whether it be merely a natural obligation or one which is both natural and actionable. It will make no difference whether such obligation is based on contract or quasi-contract, or on a wrong,—whether the first debt is due at once and unconditionally or is merely conditional, or to become due at a future date. There is this distinction, however, in the latter case that an unconditional debt or one which is due on a day certain, may be novated at once, but a conditional debt only when the condition is fulfilled which is to bring the original obligation into existence, the existence of an original obligation being a condition precedent to every *novatio*.[10]

The effect of a *novatio* as regards the original obligation is exactly the same as that of an actual payment, namely, that the original obligation is extinguished, even though it may have originated in

[8] Voet, 46 : 2 : 7.
[9] Voet, 46 : 2 : 8; G. 3 : 43 : 2.
[10] Voet, 46 : 2 : 9.

a judicial decree on judgment of the Court, that any privilege attaching to the original agreement is lost, and that all accessories, such as suretyships, mortgages, the running of interest and penal clauses, attaching to the original obligation, are at an end.[11]

Amongst particular species of *novatio* proper may be mentioned compromise (*transactio*)[12] and assignment for the benefit of creditors.

Compromise or *transactio* is a mutual agreement between the parties to an obligation for the friendly settlement of something doubtful or uncertain connected with it without going to law, something being given up, retained, or promised on either side.[13]

A compromise may validly be made by any person not expressly prohibited, and therefore even by a guardian, the administrator of a partnership estate or such like, with reference to all matters within the scope of their authority.[14] In the case of a guardian, however, no compromise without the leave of the Court can be entered into which has the effect of alienating the immovable property of a minor.[15]

An agent will not be entitled to make a compromise unless he has a special authority for that purpose or a general authority with full powers.[16]

A partner may compromise as regards his share in any matter, as also may one of several co-plaintiffs or co-defendants in a lawsuit.[17]

Even a fiduciary may compromise with respect to fideicommissary property, so long at least as the

[11] Voet, 46 : 2 : 10; V. D. L., p. 269.
[12] Voet, 46 : 2 : 3.
[13] *Cachalia* v. *Harberer & Co.*, (1905) T. S. 462; Voet, 2 : 15 : 1; G. 3 : 4 : 2.
[14] Voet, 2 : 15 : 2; G. 3 : 4 : 3; Schorer, Note 316.
[15] Voet, 2 : 15 : 2; G. 3 : 4 : 3; V. D. K., Th. 517.
[16] Voet, 2 : 15 : 3.
[17] Voet, 2 : 15 : 6.

condition of the *fideicommissum* has not yet been fulfilled, and provided that the right to what is given up is clearly doubtful, and that the fiduciary has acted *bonâ fide* in entering into the compromise.[18] A fiduciary will, however, act more wisely if he abstains from all compromises, except with the leave of the Court.[19]

An executor not being entitled to pay any debts which are not actually due by the estate under his administration cannot validly make a compromise with respect to a debt which is not actually due.[20]

As to the subject-matter of compromises it may be laid down generally that all doubtful matters and matters in dispute between two parties may be compromised, in so far as such compromise does not affect the right of third parties.[21] A conflict of opinion, however, existed amongst Roman-Dutch authors with respect to maintenance.[22]

There can be no valid compromise with respect to future crimes, but there is nothing to prevent any person who has been specially injured by a crime already committed, to make a compromise with respect to the compensation to be paid him for such injury.[23]

A compromise may be concluded either judicially or extrajudicially, and in the latter case either verbally or in writing, provided only that its terms can be clearly proved.[24] It may also be concluded either simply or conditionally, or with a penal stipulation in the event of a breach.[25]

[18] Voet, 2 : 15 : 8 and 9 ; Schorer, Note 316.

[19] Voet, 2 : 15 : 8; Schorer, Note 316 ; V. D. K., Th. 516.

[20] *Van Heerden* v. *Executors of Van Heerden*, 21 S. C. 295.

[21] Voet, 2 : 15 : 11–13 ; G. 3 : 4 : 4; Schorer, Note 318; V. D. K., Th. 319; V. L., vol. 2, p. 502.

[22] Voet, 2 : 15 : 14 ; Schorer, Note 317 ; V. L., vol. 2, p. 501, § 2.

[23] Voet, 2 : 15 : 16 ; Schorer, Note 319; V. L. vol. 2, p. 503 ; V. D. K., Th. 520; R. Obs., part 4, obs. 344 ; *Q.* v. *Thomas*, 1 Buch. App. C. 205.

[24] *Cachalia* v. *Harberer & Co.*, (1905) T. S. 464.

[25] Voet, 2 : 15 : 1 ; G. 3 : 4 : 6.

A compromise has a similar effect to that of *res judicata* as regards the original obligation, and will be an absolute defence to any action based thereon.[26] It will, however, have to be strictly interpreted and not extended beyond the subject-matter expressly mentioned therein.[27]

An assignment for the benefit of creditors is an agreement between a debtor and his creditors, whereby the former undertakes to assign or make over the whole of his assets to a certain person, generally one of the creditors, who is called an assignee, and who undertakes to liquidate the estate to the best interests of all parties concerned, and to apply the proceeds to the payment of the debts of the debtor, and the creditors undertake to release the debtor from all further liability to them with regard to the same.

The parties to an assignment must, just as in any other agreement, be competent to contract. An agent will only be competent to agree to an assignment in so far as it may fall within the scope of his authority.[28]

It is not necessary that all the creditors should agree to an assignment. It will be binding on those who do agree, unless it was a condition precedent to the assignment that all the creditors should join.[29] An assignment will not, however, be binding upon a creditor who was no party to it.[30]

[26] *Steytler* v. *Brink*, 1 Searle, 123; *Cachalia* v. *Harberer & Co.*, (1905) T. S. 464; Voet, 2 : 15 : 21.

[27] Voet, 2 : 15 : 21 : G. 3 : 4 : 7; Schorer, Note, 320; *Union Bank* v. *Zeederberg*, 3 S. C. 158.

[28] *Hamilton, Ross & Co.* v. *Zeederberg*, 3 S. C. 184; *Liquidators of the Cape of Good Hope Bank* v. *Deneys*, 8 S. C. 163.

[29] *Hossack* v. *Lippert*, 3 S. C. 272. See also *J. O. Smith & Co.* v. *Standard Bank of British South Africa*, 1 Buch. 253, in which the judgment of the Supreme Court was reversed by the Privy Council on the ground that there was a condition that all the creditors should join and that they had not done so. See also *De Klerck* v. *Walters and another*, 25 S. C. 525.

[30] *Anderson and Murison* v. *Bailey and Lutley*, 3 S. C. 263; *Letterstedt's Executors* v. *Pilkington*, 5 Searle, 11.

An assignment need not be in writing, unless it has been specially agreed that it is not to be binding until reduced to writing and signed by the parties.[31] Any creditor, therefore, who has verbally agreed at a meeting of creditors to sign a deed of assignment, may be compelled by action to do so.[32]

An assignment will not be binding upon the creditors, if the debtor is guilty of fraud in the carrying out of the assignment.[33]

A creditor cannot withdraw from an assignment once entered into by him,[34] unless the agreement was conditional, and the condition has not been fulfilled,[35] as where it was conditioned that all the creditors had to sign, and all had not done so.[36]

The effect of an assignment will be to prevent a creditor who was a party to it from suing the debtor.[37]

Whether an assignee under our law can appoint a substitute to manage the affairs of the estate assigned to him is not quite clear, but it would appear that he may do so whenever it is the ordinary custom of the country to employ a sub-agent for any particular purpose. Where this is not the case, and where no special necessity exists for the employment of a sub-agent, the assignee will be liable for any misappropriation of moneys made by a sub-agent appointed by him.[38]

An assignee is bound to render an account of all

[31] *Radclyffe* v. *Stanford*, 4 S. C. 1. See also *Stanford* v. *Brunette and others*, 3 Searle, 101, and 14 Moore's P. C. 25.

[32] *Labe and Meyerowitz* v. *Paterson and De Heton*, 21 S. C. 370.

[33] *Baartman and Norden* v. *Norton's Executors*, 1 Searle, 297.

[34] *Hossack* v. *Lippert*, 3 S. C. 272.

[35] *Bosman* v. *Falconer*, 18 S. C. 162; *Harvey* v. *Crawford*, 2 H. C. 31.

[36] *Gourlay, Cavanagh & Co.* v. *Gromer*, 2 S. C. 612.

[37] *Juta, Thooft & Co.* v. *Glynn*, 1 Roscoe, 102; *Trustees of the Somerset East Bank* v. *Cooper*, 1 Roscoe, 238.

[38] *Gertenbach and Bellew* v. *Mosenthal and others*, 6 Buch. 88.

moneys received by him, and to pay any balance that may thereby be shown to be due.[39] He is also bound to pay all debts he has undertaken to pay, but not any others.[40]

CHAPTER V.

DELEGATIO.

Delegatio is that form of *novatio* which is brought about by means of the intervention of a third party. It is, in fact, an agreement between the debtor, the creditor, and a third party, whereby it is mutually agreed that the third party is to become the debtor to the creditor under the existing obligation, and that the original debtor is to be discharged from all further liability.[1] A special instance of such *delegatio* is the assignment of a lease, whereby the lessee, with the consent of the lessor, assigns an otherwise unassignable lease to a third party, who thereby becomes lessee in his stead, he himself being released from all liability.[2]

A *delegatio* may be either absolute or conditional. It will be regarded as conditional if the debtor delegates a debtor of his own to the creditor, but undertakes to pay himself if the delegated debtor does not pay within a certain time, in which case, if payment is not made by such debtor within the time agreed upon, the original debtor will become liable to be sued,

[39] *Gertenbach and Bellew* v. *Mosenthal and others*, 6 Buch. 88.

[40] *Jacob* v. *Close*, 24 S. C. 641.

[1] *Reed's Trustee* v. *Reed*, 5 E. D. C. 29; Voet, 46 : 2 : 11.

[2] *Green* v. *Griffiths*, 4 S. C. 350-351.

just as if there had been no *delegatio* at all. The same is the case where the *delegatio* takes place with respect to a debt not due, as where A, by mutual agreement with B and C, undertakes to pay any debt which B may contract with C at any future time, in which case the original agreement and its *novatio* will take effect at one and the same time.[3]

Delegatio will not be presumed unless the intention of the parties to release the original debtor is clearly proved.[4]

It is essential to the validity of a *delegatio* that as well the original debtor as the creditor and the new debtor shall consent to the same.[5] Hence, it follows that there can be no *delegatio* where a person merely orders his own debtor to pay something to his creditor, even if the delegated debtor obeys the order, unless there has been an agreement to that effect between the new debtor and the creditor.[6] Nor will there be any *delegatio* where my creditor, without my knowledge, and without any ratification by me, has, with the intention of a *novatio*, entered into an agreement with my debtor that the latter is to pay him some amount that he owes me.[7] Nor will there be any where the original lessor of land has for several years accepted the rent

[3] Voet, 46 : 2 : 10.

[4] G. 3 : 44 : 4; V. L., vol. 2, p. 335, § 10.

[5] *Executors of Paterson* v. *Webster, Steel & Co.*, 1 S. C. 355; *De Villiers* v. *Commaille*, 3 Menzies, 544; *Green* v. *Griffiths*, 4 S. C. 351–352; *Parkin and others* v. *Lippert and others*, 12 S. C. 185; *Contat* v. *Stanner*, 19 E. D. C. 177; Voet, 46 : 2 : 12; 3 : 3 : 8; G. 3 : 44 : 2. From an *obiter dictum* of De Villiers, C.J., in one case, however, it would appear that an alteration in this respect has been introduced into the law of this colony by custom, in the case of the cession of the lease of an *urban* tenement, which, according to him, may be effected without the consent of the lessor (*Parkin* v. *Lippert*, 12 S. C. 186), but in another case he would seem to be inclined to withdraw from that position (*Henderson and another* v. *Hanekom*, 20 S. C. 520), and certainly no authority has been given for the same (*Rolfes, Nebel & Co.* v. *Zweigenhaft*, (1903) T. S. 202).

[6] *Contat* v. *Stanner*, 19 S. C. 177; Voet, 46 : 2 : 12.

[7] Voet, 46 : 2 : 12.

from a sub-lessee, without any agreement to do so having been entered into between them and the original lessee.[8]

The effect of a *delegatio*, when legally concluded, is almost the same as that of a *novatio* proper, namely, that the original obligation becomes extinguished, and another takes its place; and this effect will not be affected if the delegated debtor afterwards turns out to be insolvent.[9] A *delegatio* also has the effect of discharging all accessories to the original obligation, such as mortgages and suretyships, and puts an end to the running of interest and the effect of delay under the original obligation.[10] It may be added that the new debtor will not be entitled to any exceptions to which the original debtor was entitled, except in the case of minority or of the benefit of the *Senatus-consultum Velleianum*.[11]

CHAPTER VI.

CESSION OF ACTION.

Cession of action is an agreement whereby a creditor or person to whom an obligation is due cedes, transfers, or makes over his claim or right of action to a third party.

The essentials of a valid cession of action correspond in the main with those of a valid transfer of ownership

[8] *Rolfes, Nebel & Co.* v. *Zweigenhaft*, (1903) T. S. 193; *Green* v. *Griffiths*, 4 S. C. 350–351; *Philips* v. *Henrey*, 4 E. D. C. 78; *Parkin* v. *Lippert*, 12 S. C. 187; Voet, 46: 2: 12; 19: 2: 2.

[9] Voet, 46: 2: 13; Schorer, Note 509.

[10] Voet, 46: 2: 14.

[11] Voet, 46: 2: 14; Schorer, Note 509.

of movable property.[1] They are (1) a right of action capable of being ceded and actually vested in the person proposing to deal with it, (2) an intention on the part of such person to cede the same, based upon some legal ground or *causa*, and (3) a formal cession of the same according to law.

The consent of the debtor to such cession is not as a general rule essential to its validity[2] (though, as will be shown further on, there are some rights which are of such a personal nature that they cannot be ceded without such consent), nor is notice to him of such cession required.[3]

As regards the rights capable of being ceded, it may be laid down generally that, subject to certain exceptions based upon the principle that a contract may be so personal in its character that it may make a reasonable and substantial difference to the party bound by it, whether the original creditor himself personally or some third party is entitled to enforce it, all kinds of rights of action may with us be freely ceded.[4]

The most important exceptions to this rule are the personal rights of *usus* and *habitatio* and leases of rural tenements. A lease of a rural tenement cannot be ceded by the lessee to a third party without the consent of the lessor, though the lease of an urban tenement may,[5] at any rate in so far as the *rights* of the lessee

[1] See Book ii., p. 59.

[2] *Executors of Paterson* v. *Webster, Steel & Co. and others*, 1 S. C. 355; *Eastern Rand Exploration Co.* v. *Nel*, (1903) T. S. 53; *Jacobsohn's Trustee* v. *Standard Bank*, 16 S. C. 203; *Bourke* v. *Gouws*, 3 S. A. R. 40; Voet, 46: 2: 12; 15: 4: 9 and 15; G. 3: 44: 3.

[3] *Eastern Rand Exploration Co.* v. *Nel*, (1903) T. S. 53; *Barry* v. *Barnes and Needham*, 3 Menzies, 473.

[4] *Eastern Rand Exploration Co.* v. *Nel*, (1903) T. S. 53; Voet, 18: 4: 12.

[5] *Executors of Paterson* v. *Webster, Steel & Co.*, 1 S. C. 355; *Green* v. *Griffiths*, 4 S. C. 350. See also Vol. III., p. 223.

are concerned, though such cession may not release him from his *liabilities* towards the lessor, for which purpose all the essentials of a *delegatio* would require to be present.[6]

The intention to cede is of the very essence of a cession of action, just as it is of a transfer of ownership in the case of a delivery of movables; and consequently a mere formal cession without such intention will not vest the right to sue in the cessionary, as, for instance, in the case of a cession made in fulfilment of a contract of sale for cash, where the price has not yet been paid, or in the case of a conditional sale as to which the condition has not yet been fulfilled.[7] The intention to cede out and out, so as to deprive the cedent of his right of action, must therefore be clearly proved.[8]

The third essential is an actual cession according to law. By our law the cession of a right of action, differing in that respect from the transfer of ownership in a corporeal movable or in immovable property, may be effected by mere agreement between the cedent and cessionary, provided there is sufficient evidence to satisfy a Court of law as to the intention of the parties and the *bona fides* of the transaction,[9] but the Courts will require the best evidence of such cession.[10]

No particular form of words is required by our law to effect a complete cession of action. What the law does require is that the intention to effect the cession

[6] *Rolfes, Nobel & Co.* v. *Zweigenhaft*, (1903) T. S. 185.

[7] Voet, 18 : 4 : 9. See also Vol. ii., p. 63, and Vol. iii., p. 192.

[8] *Wright & Co.* v. *Colonial Government*, 8 S. C. 269; *Fick* v. *Bierman*, 2 S. C. 33; *Trustees of Wright and Busbridge* v. *Brown*, 14 E. D. C. 127.

[9] *Phillips and King* v. *Trustees of Norton*, 2 Menzies, 369; *Fick* v. *Bierman*, 2 S. C. 33; *Botha* v. *Ewan*, (1906) E. D. C. 68; *Insolvent Estate of Dapino* v. *Automatic Pit Co.*, 24 S. C. 485.

[10] *Fick* v. *Bierman*, 2 S. C. 34.

shall be clear and beyond doubt, and that no further act on the part of the cedent shall be required to make the cession complete.[11]

Where a right of action exists independently of any written instrument, it may be validly ceded without the necessity for any delivery, whether of a document or anything else, because, according to Sande, an action being an incorporeal is incapable of being delivered.[12]

With the object of securing the best evidence of cessions of action, the law merchant has in course of time introduced certain formalities to be observed with respect to the cession of some contracts, whilst the Courts themselves will, in order to make certain of the intention of the parties, require in some cases something analogous to the delivery of movables in order to make a cession valid. In other cases, again, the statute law has laid down the formalities to be observed in order to make a cession completely binding.

By the law merchant the cession of a negotiable instrument, such as a promissory note, bill of exchange, cheque or bill of lading, is effected by the delivery of the instrument duly endorsed, but both endorsement and delivery are essential.[13] A certificate of shares in a joint stock company is, for the purposes of such cession, not a negotiable instrument, inasmuch as the further act of having the shares registered in the transferee's name is required in order to perfect his right.[14]

[11] *Wright & Co.* v. *Colonial Government*, 8 S. C. 269; *McGregor's Trustees* v. *Silberbauer*, 9 S. C. 38.

[12] *Mills & Sons* v. *Trustees of Benjamin Brothers*, 6 Buch. 122; *Orson* v. *Reynolds*, 2 Buch. App. C. 106; *Jacobsohn's Trustee* v. *Standard Bank*, 16 S. C. 203; *Sande, De actionum cessione*, c. 2, §§ 9 and 10.

[13] *Mills & Sons* v. *Trustees of Benjamin Brothers*, 6 Buch. 115; *Gordon, Mitchell & Co.* v. *Goldsmith*, 2 Off. Rep. 183.

[14] *Van Blommestein* v. *Holliday*, 21 S. C. 11.

Where a debt is represented by a non-negotiable instrument, such debt may validly be ceded by the delivery of such document with a written cession endorsed thereon.[15] Where, however, there has been actual delivery but without a written cession the intention to cede may be proved by evidence *aliunde*;[16] but where the sole proof of the existence of a debt is the instrument which records it, the cession of such a debt will not be complete until the instrument has been actually delivered to the cessionary,[17] unless, indeed, the document has been lost and the cedent has done everything in his power to divest himself of his right of action, especially by giving notice of the cession to the debtor.[18] The endorsement of securities, for instance, without delivery to the person to whom the endorser intends to transfer them, does not divest the endorser of his property therein, and consequently, if he becomes insolvent, they will form part of the assets of his estate, and not belong to the intended cessionary.[19] A cession will, however, be complete as soon as the cedent has done everything in his power to make it so,[20] and consequently when, in fulfilment of a sale of shares in an insurance company, a vendor had delivered the scrip or certificates of the shares duly endorsed in blank to the purchaser, the Court held that a valid cession of the shares had been effected,

[15] *Smuts* v. *Stack and others*, 1 Menzies, 297; *Standard Bank* v. *Union Boating Co.*, 7 S. C. 268; *Van der Byl & Co.* v. *Findlay and Kihn*, 9 S. C. 178; *Laing* v. *Zastron's Executors*, 1 Menzies, 229; *Van der Merwe* v. *Franck*, 2 S. A. R. 26; *Jaggar* v. *Duncan*, *Ibid*, 214.

[16] *Morkel* v. *Holm*, 2 S. C. 57; *Buyskes* v. *Hurley's Executor and heirs*, 11 S. C. 294; *Standard Bank* v. *Marais*, 12 S. C. 342; *Le Roux* v. *De Villiers*, 2 Buch. 90.

[17] *Trustee of Brink* v. *Machan and others*, 1 Roscoe, 208.

[18] *Jacobsohn's Trustee* v. *Standard Bank*, 16 S. C. 203.

[19] *Trustees of Brink* v. *Machan and others*, 1 Roscoe, 209.

[20] *Lindley and another* v. *Gedye and Henry*, 13 S. C. 86; *Roscoe* v. *Innes*, *Ibid*, 281.

though the trust-deed of the company required that such cession could only take place with its consent.[21]

The mere endorsement, even when accompanied by delivery, will not as a general rule pass the ownership in shares, unless there be an intention to transfer the same. Thus, where the purchaser of shares, who has received a certificate of shares endorsed in blank by the seller, who was the registered owner of the same, delivers the same so endorsed to a third party for safe keeping, and the latter misappropriates the shares by disposing of them to another person, this will not pass the ownership in the shares to such person, the certificate endorsed in blank not being a negotiable instrument. If, however, the person to whom the certificate was delivered for safe custody was a broker, it will be different, a broker being a person whose chief business it is to sell and deliver shares on behalf of customers, and a purchaser receiving a certificate of shares endorsed in blank from a broker in the ordinary course of business is therefore entitled to assume that the broker had authority to deal with the same.[22]

There was one form of right of action which according to the law of Holland required special formalities for the purpose of being ceded, namely, the right which was based on a hypothec of immovable property. Such a right of action secured by a bond over immovable property could only be validly ceded *coram lege loci*, and upon payment of a transfer duty of 2½ per cent.[23] A cession made without such formal transfer did not pass any real rights to the cessionary,

[21] *McGregor's Trustees v. Silberbauer*, 9 S. C. 36.

[22] *Van Blommestein* v. *Holliday*, 21 S. C. 11.

[23] *Le Roux* v. *De Villiers*, 2 Buch. 92; Voet, 20 : 4 : 35.

and, though it entitled the cessionary to receive a payment, gave him no right to sue on the cession, nor did it effect such a complete assignment of the debt as to shift the risks of the debt on to him.[24] By the law of the Cape Colony, however, apparently introduced by custom, no such formal cession is required, it being sufficient to deliver the bond with an act of cession endorsed thereon or contained in some separate deed, properly identifying the bond to be ceded,[25] and that whether the bond be a special hypothec of immovable or movable property or a general bond. This customary law is clearly consistent with the general principles of our law of debt registry, which requires the registration of mortgages. The main object of this rule is to protect creditors against fraudulent and reckless debtors by giving public notice to all the world as to the extent to which these latter have encumbered their assets; but this object is sufficiently met in the case of a mortgage bond by having it registered once for all, without its being a matter of much, if any, importance who is entitled to the same.

The difference between the law which requires the original registration of mortgage bonds, and the custom which has dispensed with the necessity of registering cessions of such bonds has been clearly illustrated in the, at first sight, apparently conflicting decisions in the cases of *Van Aardt* v. *Hartley's Trustees*,[26] and *Harris* v. *Buissinne's Trustee*,[27] as to which Watermayer, J., remarked as follows in the case

[24] Voet, 18 : 4 : 11.

[25] *Laing* v. *Zastron's Executors*, 1 Menzies, 229; *Trustees of Elliott Brothers* v. *Sutherland*, 2 Menzies, 349; *Le Roux* v. *De Villiers*, 2 Buch. 90; *Du Plessis* v. *Van Blerck*, *Ibid.*, 68; *Bank of Africa* v. *Harpur*, 4 E. D. C. 252.

[26] *Van Aardt* v. *Hartley's Trustees*, 2 Menzies, 135. See also *Trustee of Webster* v. *Weakly*, 3 Searle, 373.

[27] *Harris* v. *Buissinne's Trustee*, 2 Menzies, 105.

of *Wilson's Trustees* v. *Martell* :[28] "The true principle of these decisions consists in this : the salutary law of public registry for the prevention of fraud was carried out in the case of *Harris* v. *Buissinne's Trustee* according to the doctrine of Voet 41 : 1 : 39 and 42 ; but it was not extended in *Van Aardt* v. *Hartley's Trustees* beyond its special scope and object, the repression of transactions which might afford opportunity for fraud upon creditors. In Buissinne's case there was publicity by means of the registry to all the world, his creditors especially, that he was the owner of the house in question. In Hartley's case the world could not be deceived to give him credit, on a belief that he was the owner of the property bought by him but not transferred to him, and sold by him to Van Aardt. The special law governed Buissinne's case in favour of creditors. The general principles of law (for Hartley was not placed in the position contemplated by the special law) decided the case of *Van Aardt* v. *Hartley's Trustees* against the creditors who suffered no injury."

As regards statutory provisions with respect to the cession of rights of action, it may be mentioned that a certificate under the common seal of a limited liability company, specifying any share or shares or stock held by any member of a company, is *primâ facie* evidence of the title of such member to such share, shares, or stock ;[29] and that any instrument purporting to transfer any such shares will require to be executed by the transferor and transferee, and the transferor will be deemed to remain the holder of such shares, until the name of the transferee is entered

[28] *Wilson's Trustees* v. *Martell*, 2 Searle, 253.

[29] Act 25, 1892, sec. 82.

in the register book of the company in respect of the same.[30]

A cession of action, once validly effected, will be irrevocable, and cannot be revoked by the cedent to the prejudice of the cessionary without the consent of the latter.[31]

By the cession, even without any notice thereof having been given by the cessionary to the debtor, all the rights of the cedent to the action are absolutely extinguished and transferred to the cessionary, so that the cedent can no longer deal with any of the rights involved in the action,[32] nor compel the debtor by legal process, if unwilling, to make payment to him, such right having passed to and become vested in the cessionary.[33] For the protection of debtors, it has, however, been laid down that if a debtor, being in ignorance of the cession, makes a payment to the cedent, he will be absolutely released.[34] This will not, however, be the case where such payment is made by the debtor after he has received notice of the cession from the cessionary,[35] nor even if the debtor merely had knowledge of the cession, without any notice having been received by him from the cessionary.[36]

But though the debt vests in the cessionary even before notice is given by him to the debtor, there is authority for saying that a creditor of the cedent who, before notice, has procured the attachment of the money due in the hands of the debtor, will be preferred to the cessionary.[37]

[30] Act 25, 1892, Sched. 3, Table A, sec. 8.

[31] Voet, 18 : 4 : 1, 6, and 15.

[32] *Van der Byl & Co.* v. *Findlay and Kihn*, 9 S. C. 178; *Estate Van der Heever* v. *Greyling*, 24 S. C. 414; Voet, 20 : 1 : 17; 18 : 4 : 15.

[33] *Fick* v. *Bierman*, 2 S. C. 34; *Frankman* v. *Imperial Insurance Co.*, 12 S. C. 38; Voet, 18 : 4 : 15.

[34] Voet, 18 : 4 : 15.

[35] Voet, 18 : 4 : 15; V. D. L., p. 265.

[36] *Estate Van der Heever* v. *Greyling*, 24 S. C. 414; Voet, 18 : 4 : 15.

[37] *Estate Van der Heever* v. *Greyling*, 24 S. C. 423; Sande, *De actionum cessione*, c. 12, sec. 10.

The cessionary steps completely into the place of the cedent, and becomes subject to the same defences and liable to the same obligations as he.[38] Thus, where the contract was induced by the deliberate fraud or any material false representation on the part of the cedent,[39] or where there has been any special agreement between the debtor and the cedent which would have served as a good defence in an action by the cedent, these facts may be used as a defence against the cessionary also.[40] A debtor will also be entitled as against the cessionary to any right of set-off he may have had against the cedent.[41] Thus, where a lessor of property had ceded his right to the rent to a third party, giving the lessee notice of such cession, it was held that the lessee was entitled to set-off against a claim by the cessionary for rent due prior to the cession, all liquid debts which had become due to him from the lessor prior to the cession; but that he could not do this as against rent which had become due subsequently to notice of the cession having been received by him.[42] If also the cedent was bound to render accounts or do something else, the debtor may demand the same from the cessionary, who will, in his turn, have his recourse against the cedent, if he had no notice of the fact at the time of the cession.[43]

The debtor will, as a general rule, be bound to pay the cessionary the full amount of the debt due, less any right of set-off he may have had against the cedent, or which he may have against the cessionary himself.

[38] Voet, 18 : 4 : 13.

[39] *Viljoen* v. *Hillier*, (1904) T. S. 314.

[40] *Enslin* v. *Haupt*, 7 Buch. 58; *Heydenrych* v. *Langerman*, 1 Cape Times 68; *London and South African Bank* v. *Gates' Trustees*, 5 Searle, 244; *Van der Heever* v. *Cloete*, 21 S. C. 113.

[41] Voet, 18 : 4 : 13.

[42] *Smith* v. *Howse*, 2 Menzies, 163.

[43] Voet, 18 : 4 : 13.

Where, however, the cession was made in fulfilment of a contract of sale, and full value had not been given for the ceded debt, the cessionary was under the common law, which was in that respect based upon the *lex Anastasiana* of the Roman law,[44] not entitled to recover more than what he had actually paid for the debt,[45] at any rate if the debtor had, within a year after becoming aware of the cession, claimed *retractus* of the debt.[46] This rule of law did not, however, apply in Holland to a case where the debt had at the time of the cession been tendered to the debtor at the same price for which it had been ceded to the cessionary, but had been refused by him; nor where the debt had been sold by public auction to the highest bidder.[47] Nor was the rule applicable to the sale of a body of book debts or outstanding accounts;[48] nor to the case of public securities or other debts to which there are special risks attaching, rendering their recovery at full value or at all very doubtful.[49]

This rule of the Roman law and of Roman-Dutch law has now ceased to be the law, at any rate as far as the Cape Colony is concerned, inasmuch as it was decided by the Supreme Court in the case of *Seaville* v. *Colley*,[50] that it has been abrogated by disuse, and is at the same time inconsistent with the reasonable and well-established business customs of the Cape Colony. Even under Roman-Dutch law there were not wanting writers who held that the *lex Anastasiana*

[44] C. 4: 35: 22 and 23.

[45] *Deschamps* v. *Van Onselin*, 6 E. D. C. 22; Voet, 18: 4: 18 and 19; G. 3: 16: 14; V. D. K., Th. 663 and 664; R. Obs., part 3, obs. 76; Sande, *De actionum cessione*, c. 11, secs. 11, 12, and 13.

[46] *Seaville* v. *Colley*, 9 S. C. 41.

[47] Voet, 18: 4: 20.

[48] Voet, 18: 4: 20; V. D. K., Th. 664.

[49] Voet, 18: 4: 20; 5 Holl. Cons., cons. 89.

[50] *Seaville* v. *Colley*, 9 S. C. 39.

had become abrogated even in their time, either wholly or in part.[51]

By ceding a debt the cedent does not guarantee the solvency of the debtor, but merely the existence of the debt as actually due.[52]

The cedent is, of course, bound to account to the cessionary for any payments received by him after cession on account of the ceded debt.[53]

CHAPTER VII.

SET-OFF.

Set-off or *compensatio*, as it is called in Latin, is the automatic balancing of debts and credits between two persons who are mutually indebted to each other, and the reduction of the debts by the credits *ipso jure*, or by the mere force of law, without the necessity of any action on their part.[1]

Set-off may be pleaded against any creditor whatsoever.[2] It may be noted, however, that, as a matter of pleading, a defendant in reconvention will not be allowed to set-off against the claim in reconvention any further sum which he alleges to be due to him by the plaintiff in reconvention, over and above the amount claimed by him in convention. Such sum, if actually due, should have been claimed by him in

[51] Groen., *De Leg.*, C. 4: 35: 22 and 23.

[52] *De Villiers* v. *Du Toit*, 2 Searle, 284; Voet, 18: 4: 14; G. 3: 14: 12.

[53] Voet, 18: 4: 12 and 15.

[1] *Kruger* v. *Van Vuuren's Executrix*, 5 S. C. 166; Voet, 16: 2: 1; G. 3: 40: 6 and 7; V. L., vol. 2, p. 329; V. D. L., p. 271.

[2] Voet, 16: 2: 4.

convention,[3] or will have to form the subject of a separate action.

Should either the debtor or the creditor become insolvent after the right of set-off has vested, the right will pass to and against the trustee of such insolvent person. When there are mutual debts between an insolvent and any other person upon which set-off can by law be pleaded, the Master or the magistrate before whom debts are being proved, may set the one off against the other, and allow proof of the balance only, provided the debt of the insolvent, which is so set off, was due at the date of the sequestration of his estate;[4] and this will be the case even though the debt may not have been proved upon the insolvent estate.[5] Where, however, an auctioneer, who was indebted to the estate of a deceased person, was employed by the executor to sell the assets of such estate, and it was afterwards found that the estate was insolvent, and had been so at the time of the death of the deceased, and was consequently sequestrated, it was held that the auctioneer could not set-off the debt due by him to the estate against the trustee's claim for the proceeds of the sale, the reason given being that the executor who employed the auctioneer was not the same *persona* as the deceased, and there was therefore not a mutuality of debt between him or the trustee of the estate and the auctioneer.[6]

Set-off may be pleaded even against a minor, and that as well by his guardian as by an outsider. It may be opposed also to cessionaries who sue on a

[3] *Heyns* v. *Spolander*, 5 Buch. 44. See also Voet, 16 : 2 : 9.

[4] Ord. 6, 1843, sec. 28; *Hiddingh, Trustee of Manuel* v. *Norden*, 3 Menzies, 288; *Brink's Trustee* v. *De Villiers and Haupt*, 1 Roscoe, 270.

[5] *Gammie's Trustee* v. *Saban Joseph*, 6 Buch. 229.

[6] *Brink's Trustee* v. *Theron*, 4 S. C. 25.

ceded debt, and that as well to a debt which is due by themselves personally as to a debt due by the cedent, provided the latter debt was due, and was therefore liable to be set-off, before the cession. For since the ceded debt becomes *ipso jure* extinguished from the moment that mutual debts subsist between the cedent and the debtor, the cedent, at any rate to the extent of the set-off, no longer has any right of action which he can validly cede.[7] The same rule will apply where there have been several successive cessions of the same debt, in which case the debtor, if sued by the last cessionary, may set-off not only what was due to him by the cedent, but also what was due to him by the prior cessionaries; nor will it make any difference if at the time the exception is taken the cedent and all the earlier cessionaries have become insolvent.[8]

As, however, a cedent can only cede such right of action as he himself has, that is to say with all the conditions attaching to the same, it follows that if A owes an unconditional debt to B, and B has entered into an agreement with A, which is contingent upon the fulfilment of some condition as to time or otherwise, and with the express undertaking that upon the fulfilment of the condition set-off or *compensatio* shall take place between them; then if A before the fulfilment of the condition cedes his right of action upon this latter agreement to C, B will, upon the fulfilment of the condition, be entitled to the right of setting off the debt due to him by A against this latter liability, though at the time of the cession his liability and right of set-off had not yet come into existence.[9]

The right of a debtor to set-off debts due by the

[7] Voet, 16:2:4. [8] Voet, 16:2:5.
[9] Voet, 16:2:4.

cedent against the cessionary will cease whenever there has been *novatio* as regards the ceded debt between the debtor and the cessionary, or when there has been a complete *delegatio* of the debt with the consent of the debtor, the original contract having been extinguished altogether by the *novatio* or *delegatio*.[10]

Set-off may be pleaded against any kind of debt whatsoever, whether based upon similar or different grounds or causes, whether arising from contract or from wrong or injury, so that there is nothing to prevent a claim based upon wrong from being set off against a debt arising out of contract, or to prevent an amount which is to be recovered by an action *in rem* from being set off against a debt which is recoverable by an action *in personam*.[11] A sort of *quasi-compensatio* or quasi-set-off of one wrong against another is also allowed in some cases, as in the case of a plea of self-defence in an action of damages for assault or a plea that defamatory words complained of were spoken *in rixa*, or as a retort to words spoken by the plaintiff.[12]

Even a claim, for the recovery of which an action has already been instituted elsewhere, may be pleaded as a set-off. So also a provisional judgment may be set off against a judgment absolute and taxed costs against a liquid claim.[13]

A debt which is liable to be prescribed may be set off against a claim which is perpetual or imprescriptible, provided only that both debts have become due before the period of prescription has expired, even though the plea of set-off may only be taken after such expiration. There is nothing also to prevent a

[10] Voet, 16 : 2 : 6.
[11] Voet, 16 : 2 : 12; G. 3 : 40 : 9.
[12] Voet, 47 : 10 : 20.
[13] Voet, 16 : 2 : 14.

mortgage debt from being set off against an unsecured debt.[14]

By our law, differing in that respect from the Roman law,[15] set-off is allowed even in the case of a *depositum*, so that a depositary, if sued by the depositor for damages done to the property deposited, may plead set-off of expenses incurred by him with respect to such property.[16] Set-off will not, however, be allowed to a wrongful possessor, such as a thief, robber, or spoliator, the rule of our law being *spoliatus ante omnia restituendus*.[17]

A creditor to an insolvent who buys property in the insolvent estate will not be entitled to set off his claim against the estate against the purchase price of the property bought by him, there being in such a case no mutuality of debts, the debt in the one case being between the creditor and the insolvent, and in the other between such creditor and the trustee of the insolvent estate, as representing the creditors of the insolvent.[18]

There can be no set-off of one specific thing against another specific thing.[19]

The essentials of the principle of set-off or *compensatio* are (1) that there must be a mutuality between the debt claimed and the debt which it is sought to set off against it; (2) that the debt to be set off must be certain, unconditional, and liquidated; and (3) that it must be actually due.[20]

[14] Voet, 16 : 2 : 14.

[15] G. 3 : 40 : 11; C. 4 : 34 : 11; 4 : 31 : 14 : 1, *in fine*.

[16] Voet, 13 : 6 : 10; 16 : 2 : 15.

[17] Voet, 16 : 2 : 16; G. 3 : 40 : 11; C. 4 : 31 : 14 : 2.

[18] Voet, 16 : 2 : 16.

[19] Voet, 16 : 2 : 18; G. 3 : 40 : 19.

[20] *Kruger* v. *Van Vuuren's Executrix*, 5 S. C. 166; *Watson* v. *Jensen*, 23 S. C. 192; *Postmaster-General* v. *Taute*, (1905) T. S. 590–591; *Ford Brothers* v. *Clayton*, (1906) T. S. 205; *Freeman Cohen's Consolidated* v. *General Mining and Finance Corporation*, (1907) T. S. 226; *Colonial Treasurer* v. *Schoeman*, *Ibid.* 273; V. D. L., p. 271.

The main essential of a set-off or *compensatio* is that the debts which it is sought to set off against one another shall be mutual, that is, debts subsisting between exactly the same persons, acting in exactly the same capacities; but, as long as this is the case, it will make no difference whether the parties are reciprocally debtor and creditor in their individual or in a representative capacity, *e.g.* as executors to two separate estates.[21] If the parties are indeed the same, but the capacity, in which either of them figures with regard to one or other of the debts, varies, there can be no valid set-off.[22] A creditor is not therefore bound to accept by way of set-off that which is due by himself to a third party, even though the latter may consent to the arrangement,[23] unless indeed he has made a valid and *bonâ-fide* cession of his right of action to the debtor.[24] Hence, where there are two joint debtors and one of them is sued, he will not be entitled to set off what the creditor owes to another joint debtor; and if one joint creditor sues, he will not be bound to allow the set-off of what another joint creditor owes to the debtor.[25] The same principle applies to actions by and against partnerships, that is to say, debts due by the partners individually cannot be set off against claims by the partnership; nor can debts due by the partnership be pleaded in set-off in an action brought by an individual partner.[26] This rule will not, however, apply where one of two partners is merely a

[21] *Estate of J. C. Stephan* v. *Estate of H. R. Stephan*, 25 S. C. 110.

[22] *Muller Brothers* v. *Kemp and others*, 3 Searle, 171; Voet, 16 : 2 : 7; Schorer, Note 502; V. D. L., p. 271.

[23] *Liquidators of the Cape of Good Hope Bank* v. *Forde & Co.*, 8 S. C. 22; Voet, 16 : 2 : 7; D. 16 : 2 : 8 : 1.

[24] *Liquidators of the Cape of Good Hope Bank* v. *Forde & Co.*, 8 S. C. 22; Voet, 16 : 2 : 7; D. 16 : 2 : 8 : 1. See also *Schlodder* v. *Brandt*, 11 E. D. C. 79.

[25] *Henwood & Co.* v. *Westlake & Coles*, 5 S. C. 341; Voet, 16 : 2 : 7.

[26] *Briden* v. *Wills*, 4 S. C. 282.

sleeping partner, and a third party deals with the administering partner without any knowledge of the partnership, and under the impression that he is dealing with an individual. In such a case the administering partner will not be allowed, by merely joining the sleeping partner as a co-plaintiff in an action against the third party for a debt contracted in this way, to deprive the latter of a right of set-off he may have of a debt owing to him by the administering partner personally.[27]

In accordance with the rule above laid down it was decided that the old Orphan Chamber was not entitled to set off what was due to a person by one estate under its administration, against what was due by him to another estate.[28] A debtor also cannot set off a debt due to him personally against a claim made against him in his capacity as the executor of a deceased person.[29]

An agent again, who has sold goods in the name of his principal, cannot, when suing for the purchase price, be met by a plea of set-off of a debt due by himself personally.[30] In the same way a sub-agent cannot, when sued by his principal for the payment of moneys received by him on his behalf, set off a debt due to him by the intermediate agent.[31]

It would be otherwise where an agent has sold goods belonging to an undisclosed principal in his own name to a purchaser who had no knowledge of the agency, for in such a case the debtor is entitled to set off against the purchase price what is due to him by the agent personally.[32]

[27] *Briden* v. *Wills*, 4 S. C. 282.

[28] *Buchenroder* v. *The Orphan Chamber*, 1 Menzies, 308.

[29] *Ziervogel* v. *Van Zyl*, 5 E. D. C. 121.

[30] *Heydenrych* v. *Woolven*, 14 S. C. 376; Voet, 16 : 2 : 10 and 11.

[31] *Ferreira* v. *Zeiler*, 1 S. A. R. 189.

[32] *Heydenrych* v. *Woolven*, 14 S. C. 376; *Symon* v. *Brecker*, (1904) T. S. 745.

Upon the same principle the sheriff who has sold goods in execution, cannot set off against the proceeds a debt due to him by the execution creditor, for he is as regards such proceeds the representative not of the execution creditor but of the Court and of the debtor.[33]

A guardian suing in his own name is not bound to allow a set-off of what is owed to the defendant by his ward, nor *vice versâ* can what is owed by the guardian personally be set off against what he is suing for in his capacity as guardian.[34]

An apparent exception to the general rule which requires a mutuality of debts is to be found in the case of a surety who may, when sued upon his suretyship for payment of a debt due by his principal, oppose by way of set-off not only what is due from the creditor to himself, but also what is due by the latter to the principal debtor.[35] This exception is a necessary consequence of the general principle that a suretyship obligation is merely accessory to that of the principal debtor, which must be reduced *ipso jure*, in the first place by what is due by the creditor to the principal debtor, and in the second place by the creditor to the surety.[36] It is clear, however, that this principle is not applicable to the case of a principal debtor who is sued by the creditor, and who therefore cannot set off what is due by the creditor to the surety.[37]

The second essential of set-off is that the debt to be set off must be certain, unconditional, and liquidated, that is to say, such as rests on a clear right, and is certain and undoubted, the amount due having been ascertained by a confession made by the debtor, or by

[33] Voet, 16: 2: 7.
[34] Voet, 16: 2: 8.
[35] Voet, 16: 2: 11; D. 16: 2: 5.
[36] *Liquidators of the Cape of Good Hope Bank* v. *Forde & Co.*, 8 S. C. 32.
[37] Voet, 16: 2: 11.

a judgment of the Court or by a liquid document signed by the debtor, or in some other way, upon which a judgment of the Court can forthwith be given.[38]

An unliquidated claim for damages can in no case be pleaded in compensation,[39] nor will set-off be allowed of any other unliquidated claim, unless it can forthwith and readily be rendered liquidated by the Court, the decision as to whether it can be so easily liquidated being in the discretion of the Court.[40] Once a claim is liquidated it becomes capable of being set off against the plaintiff's claim;[41] but until all doubt and uncertainty as to the amount of the defendant's counterclaim has been removed, no set-off will be allowed.[42] Where the defendant's claim is based upon a liquid document, it may be set up in compensation as a matter of course.[43]

The third essential to a set-off is that the debt to be set off is actually due at the time it is pleaded. Consequently if it is not actually due, but is only to become due at some future time, it cannot be pleaded as a set-off until the due date arrives.[44] A promissory note, for instance, which is not yet due cannot be used as a set-off,[45] nor can the contingent liability of a

[38] *Norden, Trustee of Smith* v. *Norden*, 2 Menzies, 128; *Van Wyk* v. *Van Wyk*, 3 Buch. 162; Voet, 16: 2: 17; C. 4: 31: 14: 1; Inst. 4: 6: 30.

[39] *Manuel's Trustee* v. *Norden*, 3 Menzies, 526; *Smith* v. *Ramsbottom*, 8 Buch. 98; *Colonial Government* v. *Stevens & Hollingsworth*, 10 S. C. 141; *Maxwell* v. *Table Bay Harbour Board*, 17 S. C. 558; *Colonial Government* v. *Bouwer and others*, 21 S. C. 347; *Lewis and Sachs* v. *Meyer*, (1604) T. S. 900; *Clark* v. *Denny*, 4 E. D. C. 300; *Van der Vyver* v. *Gee*, 25 S. C. 632.

[40] Voet, 16: 2: 17; G. 3: 40: 8 and 10; Vinnino, *Sel. Jur. Quæst.* 1: 50; C. 4: 31: 14: 1; *Kruger* v. *Van Vuuren's Executrix*, 5 S. C. 166.

[41] *Bowers* v. *Miller and Harley*, 3 Searle, 195.

[42] *Kruger* v. *Van Vuuren's Executrix*, 5 S. C. 166.

[43] *Kruger* v. *Van Vuuren's Executrix*, 5 S. C. 168; *Trustees of George Greig & Co.* v. *Norden and Alexander*, 3 Searle, 6.

[44] Voet, 16: 2: 17.

[45] *Levin* v. *Garlick and others*, 8 S. C. 7.

surety which, though such surety may eventually be sued upon it at some future time, has not been actually paid by him.[46]

The effect of a debt which is capable of being set off is exactly the same as that of an actual payment, that is to say, it extinguishes or reduces *pro tanto* the debt against which it may be pleaded.[47] This extinguishment takes place *ipso jure*, and requires no action or admission on the part of the persons concerned in it,[48] though it can only be given effect to by judicial decree.[49]

It follows that all suretyships and mortgages given in security of a debt so extinguished become extinguished also, and interest upon the amount so extinguished ceases to run, and that any penalty stipulated upon failure to pay will thereby be avoided, provided the right of set-off has vested before the penalty becomes due.[50]

Set-off must be specially pleaded, and cannot be taken advantage of unless it has been so pleaded;[51] but this does not take away from the fact that, as to all its consequences, set-off takes effect *ipso jure*, immediately a mutuality of debts between the parties comes into existence, just in the same way as actual payment does, and yet payment also has to be specially pleaded.[52] The special averment of the right of set-off in the plea is not required for the purpose of establishing

[46] *Redelinghuys' Trustee* v. *Russouw's Trustee*, 3 Menzies, 317.

[47] *Hiddingh's Executors* v. *Hiddingh's Trustees*, 4 S. C. 204; *Smith* v. *Morum Brothers*, 7 Buch. 20; *Postmaster-General* v. *Taute*, (1905) T. S. 587; Voet, 16 : 2 : 2; Schorer, Note 502.

[48] *Kruger* v. *Van Vuuren's Executrix*, 5 S. C. 166; *Postmaster-General* v. *Taute*, (1905) T. S. 590.

[49] G. 3 : 40 : 7.

[50] Voet, 16 : 2 : 2; V. L. vol. 2, p. 329; V. D. L., p. 272.

[51] *Still* v. *Norton*, 2 Menzies, 269; V. D. K., Th. 825.

[52] *Kruger* v. *Van Vuuren's Executrix*, 5 S. C. 166; V. L., vol. 2, p. 329.

the right, but merely for the purpose of bringing the fact prominently to the notice of the Court and of enabling the defendant thereupon to prove that the set-off had already taken place retrospectively by force of law, and the debt become extinguished at the moment when the mutuality of debts became a fact.[53]

Failure to plead a set-off will not prevent a party from subsequently recovering by action any amount which he might legally have pleaded as a set-off,[54] for there may be reasons why a person should prefer the debt due to him to continue in existence instead of having it extinguished by set-off, as where such debt is bearing interest whilst the debt sued on is not.[55] But where a debtor has repeatedly omitted without any sufficient reason to set off a debt which he alleges to be due to him, this may raise a presumption against the validity of such debt.[56]

By pleading a set-off the defendant is not necessarily taken to admit the validity of the plaintiff's claim.[57]

In addition to the above modes of extinction of obligations *ipso jure* the Roman and Roman-Dutch law recognized another, namely, confusion or merger. This happened when a debtor adiated as heir the estate of his creditor or *vice versâ*, the creditor that of his debtor, *without benefit of inventory*.[58] Confusion or merger did not, however, take place where the adiation was *made with benefit of inventory*, the heir being entitled in such a case to prove his claim against the

[53] Voet, 16 : 2 : 2.

[54] *Still* v. *Norton*, 2 Menzies, 210; Voet, 16 : 2 : 2 and 3; Schorer, Note 502; Dekker's Note (c) to V. L., vol. 2, p. 329; V. D. L., p. 272.

[55] Voet, 16 : 2 : 3.

[56] Voet, 16 : 2 : 3; Schorer, Note 502.

[57] Voet, 16 : 2 : 3. But see Dekker's Note (c) to V. L., vol. 2, p. 329.

[58] Voet, 46 : 3 : 17–26; G. 3 : 40 : 4 and 5; V. D. L., p. 272.

deceased debtor's estate just like any other creditor.[59] It follows that, as under our statutory system of administration of estates, adiation has practically become obsolete, as shown in an earlier part of this work,[60] and as such adiation as still survives is always with benefit of inventory so far as the heirs are concerned, the extinction of debts by merger or confusion has ceased to exist.

CHAPTER VIII.

ARBITRATION.

A SPECIAL kind of agreement not to sue is a submission to arbitration, which is an agreement entered into between two or more persons to submit any differences or disputes which are pending or may in future arise between them to arbitration, that is to say, to the decision of one or more impartial persons, either mentioned by name in the deed of submission or without any such special mention.[1]

An agreement to refer future disputes to arbitration frequently forms part of, and appears by way of a special clause in, some other contract between the parties, they undertaking mutually that, in case of any difference or dispute arising between them in connection with such contract, they will refer the same to arbitration.[2]

[59] Voet, 28: 8: 24; 46: 3: 27.
[60] Vol. i., p. 146.
[1] Voet, 4: 8: 2; Merula, *Manier van Procederen*, lib. 1, tit. 7, c. 1, sect. 1.
[2] *Davies* v. *South British Insurance Co.*, 3 S. C. 416; *Van der Spuy* v. *Directors of the Paarl Bank*, 7 S. C. 245; *Celliers* v. *African Agricultural and Finance Association*, (1905) T. S. 15.

Where a submission to arbitration is in writing, as it usually is,[3] though informal references to assessors or valuators are not unusual, it will fall under the provisions of Act 29, 1898.[4] A reference may also take place not only by submission in advance, but also by way of ratification after an arbitrator has given his award.[5]

Besides submission to arbitration by agreement of parties, the Court itself has the power under certain circumstances to refer any action arising out of any cause or matter pending before it to any official, special referee or officer of the Court for enquiry or report, or may order the whole of such cause or matter or any question or issue of fact arising therein to be tried before an official or special referee or arbitrator agreed upon by the parties or appointed by the Court, or before any official, referee or officer of the Court appointed by the Court, in which case Sections 20 and 24 of Act 29, 1898, will apply.

All persons are competent to be parties to a reference who have the full administration of their own affairs.[6] Minors, persons of unsound mind, and married women are consequently incompetent to agree to a reference, except with the consent of their guardians, curators, or husbands.[7] Where immovable property belonging to minors is concerned in any reference, it cannot be made without the leave of the Court.[8]

All persons, who are not expressly declared incompetent in law, are competent to be arbitrators.[9] The exceptions are women, deaf and dumb persons, and

[3] V. L., C. F., part 2 : 1 : 17 : 5 and 6.

[4] Act 29, 1898, secs. 1 and 2, corresponding to the Transvaal Ordinance 24, 1904.

[5] Voet, 4 : 8 : 3.

[6] Voet, 4 : 8 : 4.

[7] Voet, 4 : 8 : 5.

[8] *Ibid.*

[9] Voet, 4 : 8 : 6; V. L., C. F., part 2 : 1 : 17 : 7.

persons of unsound mind.[10] A minor also, who is under the age of puberty, is incompetent to be an arbitrator;[11] but there is nothing to prevent a minor who has attained the age of puberty from making an award, provided the parties were aware of his minority when appointing him.[12] Under the Roman law a judge could not be an arbitrator in any matter which might in the ordinary course come before him in his judicial capacity, but on this point the authorities on Roman-Dutch law are not agreed.[13]

No man can be an arbitrator in his own cause, but there is nothing to prevent one of the parties from leaving a matter in dispute between them to the decision of his opponent,[14] or from waiving any right he may have to object to any arbitrator on the grounds of interest and the like.[15] Hence where an arbitrator has previously to the reference acted as the agent of one of the parties in the subject-matter of the arbitration, which fact was known to the other party at the time of the reference, the Court refused to entertain objections to an award, based by the latter upon the fact of such agency.[16]

Criminal cases, in so far as the prosecution or punishment of criminals is concerned, may not be submitted to arbitration;[17] but there is nothing to prevent questions of compensation for injury or damage resulting from a crime from being so referred.[18]

Matters relating to *status*, matrimonial causes,

[10] Merula, lib. 1, tit. 7, c. 1, sec. 2; V. L., C. F., part 2 : 1 : 17 : 7.
[11] Voet, 4 : 8 : 6.
[12] Voet, 4 : 8 : 7.
[13] Voet, 4 : 8 : 8; V. L., C. F., part 2 : 1 : 17 : 7.
[14] Voet, 4 : 8 : 9; V. L., C. F., part 2 : 1 : 17 : 7.
[15] Act 29, 1898, sec. 10.
[16] *Claasen* v. *Marillac Brothers*, 5 Searle, 168.
[17] Act 29, 1898, sec. 7. See also Voet, 4 : 8 : 10.
[18] Voet, 4 : 8 : 10.

and matters in which minors or other persons under legal disability are interested, may not be submitted to arbitration without the special leave of the Court.[19]

With these exceptions there is nothing to prevent the parties from submitting to arbitration all disputes between them of whatsoever nature and kind, even including matters decided upon in a previous award which has been made a rule of Court; for if the parties wish to vary or depart from a previous rule of Court, they are quite at liberty to do so.[20]

When a submission is in writing, it will, unless a contrary intention is expressed in the deed, be deemed to include the provisions contained in the Schedule to Act 29, 1898, in so far as these are applicable to the circumstances of such submission.[21] These provisions are:—

If nothing is said as to the number of arbitrators, the reference is understood to be to one arbitrator.[22]

Where no specific individual has been appointed arbitrator in the deed of submission, and any of the following cases occur:—

(*a*) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, when the occasion arises, concur in the appointment of an arbitrator:

(*b*) If an appointed arbitrator or umpire refuses to act or is incapable of acting or dies, and the submission does not show that it was intended that such vacancy should not be filled up, and the parties, or the arbitrators, as the case may

[19] Act 29, 1898, sec. 7. See also Voet, 4 : 8 : 10.

[20] *Beneke* v. *Schoeman*, 6 Buch. 137.

[21] Act 29, 1898, sec. 4.

[22] Act 29, 1898, Sched., par. a.

be, do not fill up the vacancy, or cannot agree as to the person to be appointed to fill up the vacancy :

(*c*) When the parties, or two arbitrators, are at liberty to appoint an umpire or another or other arbitrators, and do not appoint him or them in any case where such appointment is required for the decision of the matters in dispute or the due conduct of the arbitration :

(*d*) When an appointed umpire or third arbitrator refuses to act or is incapable of acting or dies, and the submission does not show that it was intended that the vacancy should not be filled up, and the parties or arbitrators do not supply the vacancy :

then any of the parties to the submission may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint, or, if agreement be necessary, to agree in the appointment of an arbitrator or umpire. If thereupon such appointment is not made or agreed to within seven clear days after the service of the notice, the Court or a judge may, on application of the party who gave the notice, and upon notice to the other party, appoint such arbitrator, umpire, or other arbitrators as may be required.[23]

When the submission provides that the reference shall be to two or more arbitrators, one or more of whom may be appointed by each party, then, unless the submission expresses a contrary intention :

(*a*) If any of the appointed arbitrators refuses to act or is incapable of acting or dies, the party who appointed him, may appoint a new arbitrator in his place.

(*b*) If, on such reference, one party fails to appoint

[23] Act 29, 1898, sec. 8.

an arbitrator, either originally or by way of substitution, as in paragraph (*a*) mentioned, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed his arbitrator may appoint that arbitrator to act as sole arbitrator, and his award shall be binding on both parties, as if he had been appointed by consent of both parties.[24]

The Court or a judge, however, will have the right to set aside any appointment in terms of these last paragraphs (*a*) and (*b*).[25]

Where a submission provides that the reference shall be to an official referee, any official referee, to whom application is made, will be bound, subject to any order of the Court or a judge, to hear and determine the matters agreed to be referred.[26]

A written submission, unless a contrary intention is expressed therein, is irrevocable, except by leave of the Court or a judge, or by consent of all the parties thereto, and has the effect of an order of Court, whether it has been made such or not.[27]

A reference to arbitration has under the common law the same effect as a *lis pendens* or pending suit, so much so that if one of the parties after entering into the submission attempts to proceed in Court upon any portion of the matter in dispute, he may after filing his declaration be met by the exception of submission to arbitration, which is equivalent to the *exceptio litis pendentis* in the case of a pending law-

[24] Act 29, 1898, sec. 9; *Bull, Sons & Co.* v. *Colonial Government*, 6 S. C. 283; *May & Co.* v. *Attwell Bros.*, 11 E. D. C. 107.

[25] Act 29, 1898, sec. 9.

[26] Act 29, 1898, sec. 5.

[27] Act 29, 1898, sec. 3; *Twentyman* v. *Chisholm*, 3 Menzies, 161.

suit.[28] In this exception the defendant may persist without answering over to the plaintiff's claim;[29] but where a defendant, instead of taking this exception, pleads over and defends the case upon the merits, he cannot afterwards raise the question on appeal.[30]

The effect of an agreement to refer future disputes arising out of a contract to arbitration, is to impose upon the parties, as a condition precedent to the maintenance by them of a suit or action based upon such contract, the necessity of first referring the question at issue between them to the decision of arbitrators. They will not be entitled to oust the ordinary tribunals of their jurisdiction, by stipulating that the decision of the arbitrators shall be final and binding upon the parties, and not subject to appeal or review by the Courts of law. A stipulation also to the effect that all disputes whatsoever, irrespective of their nature or effect, are to be referred to arbitration, will not be binding upon the parties when questions arise which go to the very validity and legal existence of the original contract. Such an agreement will only compel the parties to submit to arbitration questions involving the settlement of the amount of compensation or damage to be paid by one of the parties, or the time of paying it, or other matters of a like kind, which do not go to the root of the action, *i.e.*, which do not prevent any action at all being maintained.[31] Where a dispute therefore has reference to a matter involving the validity or otherwise of the contract itself, as where it is sought to set aside a contract on the

[28] Voet, 4 : 8 : 1 and 12.
[29] V. D. L., p. 414.
[30] *Independent Companions Society* v. *Stemmet*, 11 S. C. 230.
[31] *Edwards* v. *Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 596; *Kantoor Bros.* v. *Trans-Atlantic Fire Assurance Co.*, 4 S. A. R. 189.

ground of fraud, such dispute will not fall under the agreement to refer, and will not prevent the party damnified from seeking his remedy in Court.[32] In the case of a charge of fraud as to matters arising out of a contract, a distinction must be drawn between the case where the party, who objects to arbitration and insists upon an action at law, is the person who is charged with the fraud, and the case where it is the person who makes the charge who does so. In the former case the Courts will, as a matter of course, refuse to send a case to arbitration; in the latter, they will do so after due enquiry, it not being enough for the party merely to make the charge, there must be sufficient *primâ facie* evidence of fraud.[33]

But whenever a dispute does not go to the very existence and groundwork of the original contract and does not involve a charge of fraud, there will be nothing to prevent the parties from agreeing that no right of action based upon such dispute shall accrue to either party until a third party has decided upon the same.[34] Where this is the case, neither party will be entitled to the assistance of the Court in enforcing a disputed claim arising out of the contract, unless it has first been submitted to arbitration, or unless the right to insist upon arbitration has been waived by the other party.[35] In the case of *Davies* v. *South British Insurance Company*,[36] De Villiers, C.J., made the following remarks :—"Of course there exists some

[32] *Kantoor Bros.* v. *Trans-Atlantic Fire Assurance Co.*, 4 S. A. R. 189.

[33] *Russell* v. *Russell*, 14 Ch. D. 471.

[34] *Scott* v. *Avery*, 5 H. L. 811; *Davies* v. *South British Insurance Co.*, 3 S. C. 422.

[35] *Daniel & Co.* v. *Siebert and Van Eeden*, 9 S. C. 31; *May & Co.* v. *Attwell Bros.*, 11 E. D. C. 107 *Stanley* v. *Goldschmidt & Co.*, 1 S. A. R. 155; *Watervallen Gold Mining Co.* v. *Owen and another*, 1 S. A. R. 197.

[36] *Davies* v. *South British Insurance Co.*, 3 S. C. 421.

degree of presumption against supposing that a person by agreement intended to deprive himself of the right of having immediate recourse to the Courts of law for any infringement of his legal rights, whether those rights exist by virtue or independently of the agreement. But, where this presumption is rebutted by the terms of the agreement, there appears to me to exist no reason on principle or authority why persons should not, for valuable consideration, be at liberty to agree that any disputes arising out of a contract between them should in the first instance be referred to arbitration. The unfortunate expression that by this means the jurisdiction of the Court would be ousted appears to be founded on a fallacy. The interposition of the Court may be delayed, but its jurisdiction is not ousted. The Court still retains the power of setting aside the award of the arbitrators on sufficient grounds shown, and the award cannot be enforced without the aid of the Court."

Under the provisions of Act 29, 1898, a defendant who wishes to insist upon a matter being referred to arbitration need not wait till the plaintiff's declaration has been filed, but may at any time, after entering appearance and before delivering pleadings or taking any other step, apply to the Court to stay proceedings, whereupon the Court or a judge may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time of the commencement of the proceedings, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.[37]

[37] Act 29, 1898, sec. 6.

An exception based upon an agreement to submit to arbitration cannot be taken by a plaintiff in convention to a claim in reconvention where the claim in convention was itself based upon the contract containing the agreement to refer, of which he is attempting to take advantage in reconvention.[38]

A submission to arbitration, entered into between a creditor and a principal debtor, will only bind the parties themselves, and therefore cannot affect the rights of a surety who was not a party to the reference.[39]

With regard to the conduct of an arbitration the rule of the Roman law was that all the arbitrators had to be present at the inquiry, and that an award given by two out of three arbitrators in the absence of the third was void, the reason being that though it is true that the third arbitrator could not, even if present, have overcome the other two by his vote, yet he might have done so by his arguments, and might have persuaded them to another decision than the one come to by them in his absence.[40] The common law introduced a change in this respect, and laid it down that, if all three arbitrators had been duly summoned to attend, and one of them absented himself without being able to give any reasonable excuse for his absence, the others might proceed with the inquiry and give their award, which would be as valid as if all three had been present, and according to Groenewegen, Wassenaar, and Van Leeuwen, this rule was observed under our common law.[41] It is submitted, however, that the

[38] *Riegler* v. *African Lands and Hotels Co.*, 24 S. C. 393.

[39] *Orphan Chamber* v. *Cloete*, 3 Menzies, 157.

[40] Voet, 4 : 8 : 16; V. L., C. F., part 2 : 1 : 17 : 9.

[41] Voet, 4 : 8 : 16; Groen., De Leg., D. 4 : 8 : 17 and 18; Wassenaar, Pract. Jud., cap. 26, n. 18; V. L., C. F., part 2 : 1 : 17 : 9.

decision of this question will entirely depend upon the wording of the deed of submission, the assistance of the Court being invoked under Act 29, 1898, wherever necessary for the appointment of another arbitrator in the place of the one who wilfully refuses or neglects to do the work entrusted to him.

The arbitration must be conducted in the presence of both parties to the submission;[42] but there is nothing to prevent the parties from making an express agreement that the arbitration may be proceeded with in the absence of one of the parties,[43] or that the parties are, after the hearing of the evidence, to hand in separately to the arbitrators "the arguments and observations of their legal advisers upon the case," though the latter is not a course to be recommended or approved.[44] The general rule, however, is so strong that it has been laid down that if an arbitrator desires to obtain any information at all from either party or from a witness, he must summon both parties before him, and thus give each an opportunity of hearing the evidence, and of making any observations he may think fit upon the same. Any failure on his part to do so will invalidate the award, even though no actual injustice may have been done in the particular case.[45] The Court will not inquire whether justice has or has not been done, its only duty being to see whether the rules regulating proceedings in arbitration have been observed, and of these one of the most important is that every step in the proceedings is to be conducted in the presence of both parties. Consequently it has been held that where only one of the parties was

[42] *Newman* v. *Booty*, *N. O.*, 18 S. C. 116; Voet, 4 : 8 : 15.

[43] *Landeschut* v. *Kœnig*, 20 S. C. 33; Voet, 4 : 8 : 15.

[44] *Cross* v. *Niland*, 5 Searle, 142.

[45] *Macdonald & Co.* v. *Gordon & Co.*, 1 Roscoe, 251.

present whilst the arbitrators were considering their award, even though he took no part in the proceedings, this mere fact was sufficient to invalidate the award.[46]

If, however, either party, after reasonable notice, neglects or refuses to attend without any sufficient reason being given for his absence, the arbitrators or umpire may proceed with the arbitration even in his absence.[47]

The arbitration will have to be conducted at the place specified in the reference,[48] and, where no place has been mentioned, the arbitrators or umpire may from time to time decide upon such place as may be reasonably accessible to the parties, and convenient for the purposes of the reference.[49]

It will, as a general rule, have to be completed within the time mentioned in the deed of submission,[50] unless the parties have by mutual agreement consented to extend the time.[51] The time for making the award may also from time to time be enlarged by order of the Court or a judge, and that whether the time for making the award has already expired or not.[52] When an award has been remitted by the Court to the arbitrators or the umpire for reconsideration, the award will, unless the Court direct otherwise, have to be made within three months of the date of the order of remittal.[53]

When no time for making the award has been fixed by the deed of submission, the arbitrators will be

[46] *Croll, q.q. Kerr* v. *Brehm*, 2 Searle, 227.

[47] Act 29, 1898, Sched., par. o. *Twentyman* v. *Chisholm*, 3 Menzies, 169; *Newman* v. *Booty*, *N. O.*, 18 S. C. 116.

[48] Voet, 4 : 8 : 17.

[49] Act 29, 1898, sec. 19.

[50] Voet, 4 : 8 : 17; V. L., C. F., part 2 : 1 : 17 : 14.

[51] *Town Council of Cape Town* v. *Cape Government Railways*, 20 S. C. 32.

[52] Act 29, 1898, sec. 15.

[53] Act 29, 1898, sec. 16 (2).

bound to make their award in writing within three months after entering upon the reference, or after having been called on to act by notice in writing from any party to the submission, if the latter be the earlier date, or on or before any later day to which the arbitrators, by any writing signed by them, may from time to time enlarge the time for making the award; provided, however, that such further period may not exceed four months.[54]

The actual meeting place and time for holding the sittings of the arbitrators are matters to be fixed by the arbitrators, and not by the parties themselves.[55]

The parties to the reference will, subject to any legal objection, have to submit to be examined by the arbitrators or umpire on oath or affirmation, and to produce all books, deeds, accounts, papers, writings, and documents in their possession or power, which may be required or called for, and to do all other things which during the proceedings on the reference the arbitrators or umpire may require.[56]

Witnesses will, if the arbitrators or umpire think fit, be obliged to be examined upon oath or affirmation,[57] and any witness who wilfully or corruptly gives false evidence will be guilty of perjury.[58]

The oral evidence of the witnesses will have to be recorded by the arbitrators or umpire before whom it is given.[59]

As a general rule the arbitrators are the absolute judges of the competency and relevancy of the evidence tendered to or received or rejected by them; but there

[54] *Ibid.*, Sched., par. d.
[55] *Bull, Sons & Co.* v. *Colonial Government*, 6 S. C. 283.
[56] Act 29, 1898, Sched., par. g.
[57] *Ibid.*, Sched., par. h.
[58] *Ibid.*, secs. 29 and 13*a*.
[59] *Ibid.*, Sched., par. k. But see *Pasquali Co.* v. *Diaconicolas and Copsopulus*, (1905) T. S. 484.

would be nothing to prevent the Court upon sufficient cause shown, from setting aside an award on the ground that the arbitrators had refused to receive competent and relevant evidence tendered to them by the party against whom the award is made.[60]

An arbitrator, once he has accepted a reference, will be bound to carry the arbitration through to its final conclusion without unnecessary delay and, in default, may be compelled to do so by an order of Court,[61] though he will be excused or even relieved from the arbitration altogether, if he can show just cause, such as ill health or unavoidable absence.[62]

Every arbitrator and umpire will also have to be, and to continue to be throughout the reference, disinterested with reference to the matters referred and the parties to the reference;[63] and any party to the reference may require such arbitrator or umpire, before beginning or continuing his duties, to make a sworn declaration that he has no interest direct or indirect in the matters referred or in the parties to the reference, and that he knows of nothing disqualifying him from being impartial and disinterested in the discharge of his duties.[64] When an arbitrator fails in this respect or has been guilty of misconduct in connection with the matters referred to him, he may be removed by order of the Court.[65]

It will not be open to one of the parties, after a submission has been duly agreed upon, to withdraw from the arbitration without the consent of the other party to the same.[66]

[60] *Twentyman* v. *Chisholm*, 3 Menzies, 167.
[61] Voet, 4 : 8 : 14, 21, and 22; V. L., C. F., part 2 : 1 : 17 : 14.
[62] Voet, 4 : 8 : 21.
[63] V. L., C. F., part 2 : 1 : 17 : 7.
[64] Act 29, 1898, sec. 10.
[65] Act 29, 1898, sec. 11 and 17 (1).
[66] *Melvin* v. *Building Committee of St. Cyprian's*, 9 E. D. C. 1.

An arbitrator should be careful not to exceed the limits of his powers under the deed of submission, nor to decide upon matters not referred to him.[67]

Where a submission is conceived in general terms, it will be regarded as including only such matters as were in dispute between the parties at the date of the reference and not such as only arose afterwards.[68]

An arbitrator's duties will not be complete until he has given a decision on all the matters referred to him or until he has given a final and definitive sentence.[69] In construing an award, however, the Courts always aim as far as possible to uphold awards and will make every reasonable presumption in favour of the award being a final, certain and sufficient termination of the matters in dispute. They will not allow awards to be defeated by technical rules of construction; and where the language of an award leads to the reasonable conclusion that that which was awarded was intended to be an award or settlement of all the claims referred, effect will be given to such award as final.[70] The mere fact that an arbitrator has left a certain point undecided will not necessarily render his whole award null and void. The Court has under our law a wide discretion. There may be circumstances under which the Court will not only refuse to make an award a rule of Court, but will treat it as null and void; but it does not follow that the award is null even without such order. The Court may, for instance, refer the award

[67] *Williams* v. *Estate of Williams*, 19 S. C. 443; *Sapeiro* v. *Ferreira and others*, 23 S. C. 84; *Boeschoten* v. *Robertson*, 3 Off. Rep. 174; *Maladry* v. *De Koning*, (1905) T. S. 528; *Baldwin* v. *Bateman*, (1908) T. S. 54; Voet, 4 : 8 : 18; V. L., C. F., part 2 : 1 : 17 : 12; Merula, b. 2, tit. 7, c. 1, § 1.

[68] Voet, 4 : 8 : 18. See also *Lushington Board of Management* v. *Loest*, (1906) E. D. C. 260; and *Loest* v. *Lushington Board of Management*, *Ibid.* 327.

[69] *Wynberg Valley Railway Co.* v. *Eksteen*, 1 Roscoe 70; Voet, 4 : 8 : 18.

[70] *Lippert & Co.* v. *Town Council of Port Elizabeth*, 3 E. D. C. 193.

back to the arbitrator to be rendered final and complete. It is also open to the party applying to have an award made a rule of Court to treat an undecided point as if it has been decided in favour of the opposite side, and to ask to have the remainder of the award made a rule of Court.[71]

If the arbitrators meet with any difficulties on points of law, they may submit such points as a special case for the opinion of the Court;[72] and they may also be compelled to do so by an order of Court.[73]

If there are two arbitrators, they will both have to agree for the decision of any matter, and, if they cannot, they may appoint an umpire.[74] An umpire may also be appointed when there are more than two arbitrators and they cannot agree.[75]

If there are more than two arbitrators, the decision of the majority of them will determine all questions.[76]

Where the arbitrators or a majority of them cannot agree in their award, their decision will not be taken to be either the least amount or the least right of relief awarded by them, or the average of what has been awarded by them, but the matter will have to be referred to the umpire, unless the submission otherwise provides.[77]

An arbitrator may in making his award fix a time within which it is to be carried out, and may award the payment of a fine for any contravention of the terms of the award.[78]

[71] *Basson* v. *Herman*, (1904) T. S. 98.

[72] Act 29, 1898, sec. 13 (b).

[73] *Ibid.*, sec. 27.

[74] Act 29, 1898, Sched., pars. b and c. See also Voet, 4 : 8 : 13.

[75] Act 29, 1898, Sched., par. c.

[76] *Ibid.*, Sched., par. b. See also Voet, 4 : 8 : 19; V. L., C. F., part 2 : 1 : 17 : 9.

[77] Act 29, 1898, sec. 12. See also Voet, 4 : 8 : 19; Groen., De Leg., D. 4 : 8 : 27 : 3, *in fine*; V. L., C. F., part 2 : 1 : 17 : 9.

[78] *Otto* v. *Lategan*, 9 S. C. 250.

The costs of the reference and award are in the discretion of the arbitrator or umpire.[79]

A reference will fail whenever the dispute is of such a nature that it is not capable of being settled by arbitration, or if a defendant who takes the exception of submission to arbitration has himself placed difficulties in the way of the arbitration.[80] It will fail also upon the death of the arbitrator or the expiration of the time agreed upon for the making of the award, or upon the arbitrator being excused by the Court from completing the award, as also by the insolvency or supervening lunacy of one of the parties.[81]

Under the common law a reference used to fail also upon the death of one of the parties, unless it was expressly stipulated in the deed of submission that it was to bind the heirs of the parties on both sides also,[82] but by our statute law it is now provided that, if any party to an arbitration dies, the arbitration shall be stayed, subject to any order that the Court may make, until the appointment of an executor or other representative of the deceased party, who will, when appointed and when called upon by the other party to the submission to proceed with the arbitration, be placed in exactly the same position as the deceased, if alive, would have been.[83]

It was frequently the practice under the common law to insert a clause in the deed of submission to the effect that, if the arbitrators disagreed, they might appoint another person as a third arbitrator or as an

[79] *May & Co.* v. *Attwell Bros.*, 11 E. D. C. 107; Act 29, 1898, sec. 28 and Sched., par. j.

[80] *Daniel & Co.* v. *Siebert and Van Eeden*, 9 S. C. 33; *Power* v. *Hunter*, 12 S. C. 424.

[81] *Merula, Manier van Procederen*, l. 1, tit. 7, c. 1, § 4.

[82] *Evans* v. *Van der Plank and Cleghorn*, 1 Searle, 252; Voet, 4: 8: 20; *Merula, Manier van Procederen*, lib. 1, tit. 7, c. 1, § 4.

[83] Act 29, 1898, Sched., par. p.

umpire to decide between or for them.[84] But at the present day under our statute law it is in the power of the arbitrators, if there are two or more of them, whether there be such a clause in the deed of submission or not, to appoint an umpire at any time within the period during which they have power to make an award, whether in anticipation of difference of opinion arising between them, or after such difference of opinion has actually arisen.[85]

The umpire when appointed may enter upon the reference in lieu of the arbitrators whenever the latter have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission or to the umpire a notice in writing, stating that they cannot agree.[86]

The umpire will be at liberty to act upon the evidence recorded before the arbitrators, and to make his award without hearing any witnesses or taking any fresh evidence; but he may, if he thinks fit, rehear some or all of the witnesses or call for further evidence.[87]

He will be bound to give the parties notice of his appointment, and call upon them to appear before him,[88] so as to enable them to lead further evidence before him, if so advised, or to be heard by him.[89]

He may sit together with the arbitrators, if he wishes, and hear the evidence given before them;[90] and, if he does so, he may then and there decide any

[84] Voet, 4 : 8 : 13; V. L., C. F., part 2 : 1 : 17 : 10.

[85] Act 29, 1898, Sched., par. c.

[86] *Hawes & Co.* v. *Meintjes and Dixon*, 3 Searle, 62; Act 29, 1898, Sched., par. c.

[87] Act 29, 1898, Sched., par. l. But see Act 29, 1898, sec. 31, and *Loest* v. *Lushington Board of Management*, (1906) E. D. C. 333.

[88] *Groenewald* v. *Smith*, 3 Menzies, 159.

[89] *Wood* v. *Gilmour*, 3 Menzies, 159; *Fryer and others* v. *King*, 3 Menzies, 160.

[90] Act 29, 1898, Sched., par. m.

interlocutory matters upon which the arbitrators cannot agree; or, if he does not, he may be called upon at any time by the arbitrators to decide any matter of procedure or any interlocutory question upon which they cannot agree.[91]

The award made by the arbitrators or umpire will be final and binding upon the parties and all persons claiming under them,[92] and cannot afterwards be altered even by the arbitrators themselves, except under an order of Court remitting the case back to them for reconsideration,[93] though they may correct any clerical mistake or error arising from any accidental slip or omission, at any rate before the award has been made a rule of Court.[94]

The award will have to be carried out by the parties to the submission, and will entitle either of them as well to a right of exception as to a right of action, that is, to the right to move that the award be made a rule of Court.[95]

No award can be enforced without the assistance of the Court,[96] but, when once it has been made a rule of Court, it will be enforceable like any other judgment of the Court.[97]

An award with respect to the real rights of owners of property will bind not only such owners themselves, but also their successors in title.[98]

A clause is often inserted in a deed of submission giving either party the right to apply to have the award made a rule of Court,[99] and, when this is the

[91] *Ibid.*, Sched., pars. m. and n.
[92] *Ibid.*, Sched., par. i. See also V. L., C. P., part 2 : 1 : 17 : 4.
[93] *Dutch Reformed Church* v. *Town Council of Cape Town*, 15 S. C. 22; Act 29, 1898, sec. 16 (1); Voet, 4 : 8 : 23.
[94] Act 29, 1898, sec. 13 (c).
[95] Voet, 4 : 8 : 23.
[96] Voet, 4 : 8 : 1.
[97] Act 29, 1898, sec. 18.
[98] *Stimie* v. *Du Preez*, 5 Searle, 167.
[99] Voet, 4 : 8 : 31; Merula, lib. 1, tit. 7, c. 1, § 1, Note 1.

case, either party may make such application even though there may strictly be no necessity for having the award made a rule of Court.[100] The application may, however, be made even where there is no such clause in the deed of submission,[101] even if it were only to enable a party to get his costs taxed by the Taxing Master,[102] unless indeed there is absolutely no necessity for having the award made a rule of Court, owing to the other party having intimated that he is quite prepared to carry out the award to its fullest extent without any order of Court. If under such circumstances a party insists on applying, he will not be entitled to his costs of the application; but it will be for the respondent in such a case to show that the application was unnecessary.[103]

Upon such application being made it will be open to the other party to the award to appear to oppose the application upon any grounds which would justify the Court in setting aside the award,[104] such as corruption, or partiality or hostility to one of the parties, something dishonourable in the award, *ultra vires* on the part of the arbitrators, incompetency in the parties to enter into a submission, or in the arbitrators to accept the same, or unfitness in the matter to be referred.[105] It will be competent for the Court to sustain an award in part and to set it aside in part, provided that such two parts are clearly separable from each other.[106]

[100] *Landmark* v. *Swarts*, 3 S. C. 30.

[101] Act 29, 1898, sec. 23. See also *Maladry* v. *De Koning*, (1905) T. S. 528; V. L., C. F., part 2 : 1 : 17 : 16; Merula, lib. 4, tit. 93, c. 1, § 8, Note 8.

[102] *Davison Brothers* v. *Colonial Government*, 15 S. C. 318; *Burger* v. *Cape Central Railway Co.*, 6 S. C. 130.

[103] *Burger* v. *Cape Central Railway Co.*, 6 S. C. 130.

[104] *Groenewald* v. *Smith*, 3 Menzies, 158.

[105] *Williams* v. *Estate of Williams*, 19 S. C. 443; *Leathern* v. *Henderson and others*, Kotze, 46; Voet, 4 : 8 : 24.

[106] *Twentyman* v. *Chisholm*, 3 Menzies, 169; *Beneke* v. *Schoeman*, 6 Buch. 137; *Sapeiro* v. *Ferreira and others*, 23 S. C. 84.

But an award can only be made a rule of Court as it is and not with modifications.[107]

The Court or a judge may at any time remit the matters referred, or any of them, to the arbitrators or umpire for reconsideration,[108]—for instance, where the arbitrator admits that he has made a mistake of law or of fact,[109] or where new evidence has been discovered since the publication of the award.[110] But if the mistake was occasioned through the want of diligence of one of the parties in not bringing to the notice of the arbitrator any material fact which such party knew or had the means of knowing, the Court will not interfere, even if the arbitrator is prepared to admit that knowledge of such fact would have induced him to make an alteration in his award. The finality of an award should, if possible, be maintained, and, if the party complaining of a mistake is himself to blame for it, the Court will not relieve him.[111]

Under the common law the practice in Holland was that all awards of arbitrators were subject to review by the ordinary tribunals. Such review could be obtained either by an application for *reductie*, which had the same effect as an appeal, and had to be instituted within ten days after the making of the award, or by way of application for *reformatie* or review proper which could be instituted after the lapse of ten days, but had to be brought before the lapse of

[107] *Middleton* v. *Water Chute Co.*, 22 S. C. 155; *Sapeiro* v. *Ferreira and others*, 23 S. C. 88.

[108] *Wynberg Valley Railway Co.* v. *Eksteen*, 1 Roscoe, 70; *Dutch Reformed Church* v. *Town Council of Cape Town*, 15 S. C. 22; Act 29, 1898, sec. 16 (1).

[109] *Table Bay Harbour Board* v. *Metropolitan and Suburban Railway Co.*, 9 S. C. 437.

[110] *Dutch Reformed Church* v. *Town Council of Cape Town*, 15 S. C. 33; *Cape Town Town Council* v. *Pinn*, 23 S. C. 217.

[111] *Table Bay Harbour Board* v. *Metropolitan and Suburban Railway Co.*, 9 S. C. 437.

a year.[112] The grounds upon which an award could be set aside were that generally it was not in accordance with what was fair and reasonable.[113]

Since the appointment of English and Scotch judges to the Courts of the Cape Colony there has been a departure from the rules of the common law in this respect, according to De Villiers, C.J., and the principle of the finality of awards has become firmly established. The English law relating to arbitration also, though not adopted as a whole, has been freely applied to the decision of cases heard in our Courts.[114] This practice has now been converted into law by Act 29, 1898.

Under this statute the Court may set aside an award whenever an arbitrator or umpire has misconducted himself or has been guilty of any serious irregularity in the proceedings, or whenever an arbitration or award has been improperly procured; and may in doing so award costs against the arbitrator or umpire personally.[115] The same course will be adopted where the award is based upon so gross a mistake of fact or of law as could not have been made without some degree of misconduct on the part of the arbitrator;[116] but unless a gross error can be shown, the Court will not interfere with an award.[117] In the

[112] Voet, 4 : 8 : 25; V. L., C. F., part 2 : 1 : 17 : 17 and 18.

[113] *Ibid.*

[114] *Dutch Reformed Church* v. *Town Council of Cape Town*, 15 S. C. 21.

[115] Act 29, 1898, sec. 17 (2); *Dietz* v. *Pohl*, 1 Menzies, 397; *Fryer and others* v. *King*, 3 Menzies, 160; *Evans* v. *Van der Plank and Cleghorn*, 1 Searle, 252; *Leathern* v. *Henderson and others*, Kotze, 46; *New Primrose G. M. Co.* v. *Simmer and Jack*, 2 S. A. R. 241; *Middleton* v. *Water Chute Co.*, 22 S. C. 155.

[116] *Table Bay Harbour Board* v. *Metropolitan and Suburban Railway Co.*, 9 S. C. 437 : *Loest* v. *Lushington Board of Management*, (1906) E. D. C. 332. But see *Lushington Board of Management* v. *Loest*, (1906) E. D. C. 260.

[117] *Baillie* v. *Langerman*, 2 S. A. R. 220; *Hoole* v. *Munro*, (1907) E. D. C. 250.

same way it would appear that an award, which is so grossly disproportionate to the value or damages to be decided upon as to bear upon the face of it proof of partiality, would be set aside or referred back to the arbitrators. But where there is no charge of misconduct or of irregularity, the practice of allowing appeals against awards on the mere ground that the amount awarded is excessive or inadequate has become obsolete in the Cape Colony.[118]

In accordance with these rules an award will be set aside on the grounds of irregularity, such as the refusal to admit relevant and necessary evidence, or the fact that the award is based upon illegal and inadmissible evidence.[119]

A party may, however, either expressly or by conduct, waive any valid objection he may have to an award. And where a party, who alleges certain irregularities, does not object to them at the time, and afterwards takes up the award and pays the arbitrator's fees, he will be held to have waived his right to insist upon his objections.[120]

A claim for money due upon an award becomes prescribed in eight years.[121]

[118] *Dutch Reformed Church* v. *Town Council of Cape Town*, 15 S. C. 21; *Combrinck* v. *Colonial Government*, 12 S. C. 99; *Tucker and another* v. *F. B. Smith & Co.*, 25 S. C. 12.

[119] *Dutch Reformed Church* v. *Town Council of Cape Town*, 15 S. C. 23.

[120] *Chabaud and Son* v. *Mackie, Dunn & Co.*, 6 Buch. 190; *Van Aardt* v. *The Glasgow South African Co.*, 2 S. A. R. 91.

[121] Act 6, 1861, sec. 3.

CHAPTER IX.

LIS PENDENS AND *RES JUDICATA.*

The effects of submission to arbitration, and of award of arbitrators, as laid down in the preceding chapter, resemble those of the institution of an action and of a final judgment in such action respectively. The effect of these latter is to entitle a defendant who is being sued upon the same obligation as is or was in question in the pending or concluded action, to the defence of *lis pendens* in the one case, and of *res judicata* in the other. We shall begin with the latter.

The defence of *res judicata* then is based upon the fact that the same cause of action has already been decided upon by a final judgment in another action between the same parties.[1]

This defence was in Roman law called the *exceptio rei judicatæ sive litis finitæ*, the word *exceptio* being used, not in the sense of the term *exception* in our rules of pleading, but merely as meaning *defence*. It is, in fact, a plea in bar on the merits, being generally set up by way of a plea in abatement, and entitles the defendant to lead evidence in support of the plea in the same way as in any other plea on the merits.[2] It was introduced, as Voet says, with the object of putting an end to unnecessary lawsuits, and in order to prevent the repeated ventilation of the same subject-matter of dispute in different actions, with the accompanying evil of discordant and conflicting decisions.[3]

By *res judicata* is meant any final and definitive

[1] *Gagela* v. *Ganca*, (1907) E. D. C. 352; V. D. L., p. 414.

[2] *Du Preez* v. *Rose*, 3 Menzies, 353.

[3] Voet, 44 : 2 : 1.

judgment of a competent Court, either in favour of or against a defendant, or partly in his favour and partly against him, whereby an end is put to the particular action between the parties.[4]

An action is regarded as ended either when the judgment of the Court of first instance has been carried into execution in the ordinary course, or when the time allowed for appeal against it has elapsed,[5] or when such appeal has been heard and finally decided.[6] An interlocutory order, not being a final judgment or *res judicata*, will not afford ground for the exception,[7] and as instances of such interlocutory orders we may mention judgments of absolution from the instance[8] and provisional judgments.[9]

It is essential that the judgment relied upon for the purpose of the exception shall be of a *civil* character, inasmuch as neither a conviction nor an acquittal in a *criminal* trial, whether upon a prosecution by the Attorney-General or by a private individual, will be a bar to a civil action for damages at the instance of any person who may have suffered

[4] *Paterson* v. *Umzinto Sugar Co.*, 6 Buch. 160; *Schutze* v. *Rocher*, 3 Off. Rep. 126; *Schlapilis* v. *Missewitz*, (1904) T. S. 174; *Lewis and Marks* v. *Middel*, *Ibid.* 303; Voet, 42 : 1 : 1.

[5] *Meyer* v. *Carlisle, Campbell and others*, 1 Menzies, 451; *Walker* v. *Arnot*, Hertzog, 167; *Rex* v. *Kerr*, 25 S. C. 95; Voet, 44 : 2 : 1; 4 Holl. Cons., cons. 251. The Court of Appeal, however, will, upon sufficient cause being shown, grant relief by way of *restitutio in integrum*, and give leave to appeal even after the time for appeal has elapsed (*Smith and another* v. *Pinto*, 1 Buch. 105; *Gislin* v. *Syster*, 4 Buch. 57; *Hill* v. *De Jay*, 14 S. C. 31; *Dumeyer* v. *Priestley*, 15 S. C. 273; *Queen* v. *Melani and others*, 10 E. D. C. 98; *Cohen Brothers* v. *Samuels*, (1906) T. S. 221; *Rymer* v. *Solomon*, 9 S. C. 470; *Rowsell* v. *De Stadler*, 12 S. C. 399; *Harris* v. *De Waal*, *Ibid.* 409; *Davids* v. *Mendelsohn*, 15 S. C. 343; *Saayman* v. *Le Grange*, 8 Buch. 110, and 3 Roscoe, 25; Schorer, Note 529. This being so, there would seem to be no reason why the Court should not also, upon sufficient cause being shown, exercise a discretion as to allowing the *exceptio rei judicatæ*.

[6] *In re Richardson, Executors of Woutersen, q.q.*, v. *Nisbet and Dickson*, 1 Menzies, 420; Voet, 42 : 1 : 2; G. 3 : 44 : 5; V. L., vol. 2, pp. 515 and 531.

[7] Voet, 42 : 1 : 4.

[8] *Grimwood* v. *Balls*, 3 Menzies, 448; Voet, 42 : 1 : 5.

[9] Voet, 42 : 1 : 6.

any injury from the commission of any crime or offence.[10] But it is not essential that it shall have been given in a formal civil action; provided the judgment is civil in its nature, it will afford a good ground of exception, even though it may have been given in the course of a criminal trial under a statutory authority to that effect, such as Section 14 of Act 18, 1873,[11] or Section 8 of Act 35, 1893.

It will make no difference whether the judgment relied on was delivered in the same or a different, or even in a foreign, tribunal.[12]

A final judgment, which amounts to *res judicata*, is accepted as the truth, and as laying down the legal rights subsisting between the parties to the action, until it has been upset or reversed on appeal,[13] unless indeed the Court by which it was delivered had no jurisdiction, or unless the judgment was given in the absence of the defendant, and without legal notice having been served upon him.[14] This rule is based upon the presumption that the serious and deliberate judgment of a competent tribunal upon any matter submitted to it is correct, which is a *presumptio juris et de jure*, that is to say, irrebuttable, and one which the law upon grounds of public policy will not allow to be questioned by any proof to the contrary.[15]

[10] Ord. 40, 1828, sec. 12; *Hare* v. *Kotze*, 3 Menzies, 472; *Eaton* v. *Moller*, 2 Roscoe, 85; *Mostert* v. *Fuller*, 5 Buch. 23; *Van der Westhuysen* v. *Raubenheimer*, *Ibid.* 37; *Colonial Secretary* v. *Breda's Curator*, 7 Buch. 13; *Fischer* v. *Genricks*, 4 S. C. 31; *Shaw* v. *Williams*, 3 E. D. C. 251; *Williams* v. *Young*, Kotze, 134. See also *Rossouw* v. *Sturt*, 1 Menzies, 378; *Poney* v. *Nyeleka and others*, 4 S. C. 219.

[11] *Schlapilis* v. *Missewitz*, (1904) T. S. 174.

[12] *Wolf*, *N. O.*, v. *Solomon*, 15 S. C. 297.

[13] *Du Toit* v. *Malherbe*, 2 Menzies, 299; Voet, 42: 1: 29; 44: 2: 1; Schorer, Note 526; V. L., vol. 2, pp. 513 and 515. But not as regards persons who are not parties to the suit (*Voet*, 42: 1: 29).

[14] Schorer, Note 526.

[15] *Bertram* v. *Wood*, 10 S. C. 180; G. 2: 3: 7; 3: 49: 1; Schorer, Note 526.

A final judgment will not have the effect of extinguishing the original cause of action, unless it has been converted into *res judicata*, as defined above.[16] Consequently it will not be a good defence to an application for provisional sentence upon a mortgage bond, that a judgment has already been obtained upon it, when the previous judgment has not been complied with.[17]

Res judicata does not take effect as a defence *ipso jure*, but requires to be specially pleaded. There is nothing, therefore, to prevent a plaintiff from instituting a fresh action with respect to the same subject-matter with regard to which judgment has been given against him in a previous suit, but, if he does so, he may be met by the *exceptio rei judicatæ*,[18] the right to which, if the defendant fails to plead it, will be regarded as having been waived.[19]

Whether any discretion is left to the Court as to allowing or overruling this exception is not quite clear, but it is submitted that such a discretion is allowed in all cases in which the Court would be entitled to grant relief against a final judgment, as, for instance, by granting leave to appeal after the time for appeal has elapsed. Such discretion was at any rate exercised in one particular case.[20]

The essential requirements of the *exceptio rei judicatæ* are threefold, namely, that the previous judgment shall have been given in an action (1) with respect to the same subject-matter, (2) based upon the same ground, and (3) between the same parties.[21] If one of these essentials be wanting, the exception will fail.[22]

[16] See p. 218, above.

[17] *Estate Turnbull* v. *Cowley*, 23 S. C. 244.

[18] Voet, 44 : 2 : 2.

[19] Voet, 42 : 1 : 47; Schorer, Note 529.

[20] *Lawton* v. *Rens*, 3 Menzies, 483.

[21] *Bertram* v. *Wood*, 10 S. C. 180; Voet, 44 : 2 : 3; G. 3 : 49 : 2; Schorer, Note 529.

[22] *Bertram* v. *Wood*, 10 S. C. 180; Voet, 44 : 2 : 3. See also *Wolf*, *N. O.*,

The first essential, then, is that the same subject-matter shall have been in dispute, and shall have been decided upon in the previous action.[23] The question as to whether the same matter was in issue in the previous case will have to be decided by reference to the pleadings filed therein, within the four walls of which the evidence to be led on either side will have to be limited. It may be some test, therefore, of the validity of a plea of *res judicata* to inquire whether the same evidence might legally have been led in the first case as will be admissible in the second;[24] but the evidence actually led can have no bearing on the question.[25]

The same subject-matter will be regarded as in issue between the parties when the same thing, whether increased or diminished in value, is prayed for, as also when only part of the thing claimed in the first action is sued for in the second; nor does it matter whether the same words are used in describing it, provided it is in fact the same thing. The same rule applies where a plaintiff having been unsuccessful in an action for the recovery of the thing itself, afterwards sues for an *accession* to it, such as the young of an animal or the fruit or crops of land previously sued for.[26]

It may be laid down, however, that where a certain sum has been claimed as interest on a capital sum and judgment given thereon, this judgment will not necessarily amount to *res judicata* as regards the principal sum, nor as regards interest which has become due

v. *Solomon*, 15 S. C. 306; *Umhlebi* v. *Estate of Umhlebi and Fina Umhlebi*, 19 E. D. C. 246; *Main Reef Gold Mining Co.* v. *Cathcart and Harsant*, Hertzog, p. 122.

[23] *Bertram* v. *Wood*, 10 S. C. 181; *Frederiks* v. *Jaffar*, 12 S. C. 281; *Walker* v. *Arnot*, Hertzog, 167.

[24] *Petree Diamond Mining Co.* v. *Dreyfus*, 2 Buch., App. C. 98.

[25] *Wolfaardt* v. *Colonial Government*, 16 S. C. 250.

[26] Voet, 44 : 2 : 3.

subsequently. But where the defendant has framed his plea in such a way as to put in issue the validity of the original debt and has, in fact, claimed a declaration that it is invalid, a decision upon such a claim would be binding between the parties and afford ground for the exception of *res judicata*. So also a judgment upon a lease for one month's rent would not be *res judicata* as against a claim for a subsequent month's rent, unless the validity of the lease had been raised and decided upon in the first action.[27]

Care should be taken not to confuse the identity of the reason or groundwork of two actions with identity of subject-matter, for, though the same reasoning may be applicable to two cases, if the actual thing which is in question in the new action is not the same as that which was adjudicated upon in the first, the plea of *res judicata* will not apply.[28] Thus where A had been successful in an action brought by him for a declaration of rights with respect to one of a certain number of claims situate along the boundary line of a *mynpacht*, all of which B, the owner of the *mynpacht*, contended fell within the boundary of his *mynpacht*, the judgment being based on the ground that all the said claims fell outside the *mynpacht*, it was held that such judgment was not *res judicata* as against a subsequent action brought by B against A for a declaration of rights as regards another of the said claims, merely because the decision of the new case would depend upon the position of the same boundary as had been in question in the first.[29]

The second essential is that the ground of action

[27] *Bertram* v. *Wood*, 10 S. C. 181. See also *Fredericks* v. *Jaffar*, 12 S. C. 381.

[28] *Main Reef Gold Mining Co.* v. *Cathcart and Harsant*, Hertzog, 116.

[29] *Ibid.*

shall have been the same, it not being enough that the thing claimed alone was the same.[30] The same ground of action may be present, even though a different form of action may be brought,[31] the defence of *res judicata* not being defeated by the fact that the action differs in form from the one previously brought, so long only as the matter in issue is the same.[32] Consequently, if a thing purchased labours under a defect on account of which the purchaser would have been entitled to either the redhibitory action or the *actio quanti minoris*, and the purchaser first institutes one of them and then the other, he may be met by the defence of *res judicata*.[33]

On the other hand, it may happen that the same form of action may be used without the grounds of action being the same.[34]

As regards the third essential it may be laid down that it is not only necessary that the previous action shall have been between the same parties, but also between them acting in the same legal capacity or *persona*. In this connection, the following persons are regarded as having the same *persona* or being clothed with the same legal capacity, namely, a deceased person and his executor, a principal and his agent,[35] a ward and his guardian or curator. A principal and his surety also are regarded as the same person for the purposes of this exception, where judgment was in the first case given in favour of the principal. The same is the case as regards purchaser and seller, where the seller has had judgment given in his favour in the previous case, but not if the purchaser has had such judgment

[30] Voet, 44 : 2 : 3.
[31] Voet, 44 : 2 : 4.
[32] *Wolfaardt* v. *Colonial Government*, 16 S. C. 250.
[33] Voet, 44 : 2 : 4. See also Voet, 21 : 1 : 6.
[34] Voet, 44 : 2 : 4; 4 : 1 : 14.
[35] G. 3 : 49 : 4.

given in his favour;[36] but the exception will hold even in this latter case if the seller, having had notice that the purchaser was being sued, failed to intervene in the action.[37] A pledgor and pledgee, a mortgagor and mortgagee are regarded as the same person with respect to the mortgaged or pledged property, whenever the former of them, after pledging or mortgaging the property, has been defeated in an action with regard to the ownership of the property by a third party, and the pledgee or mortgagee afterwards attempts to sue such third party in an action based upon the pledge or mortgage.[38] So also two joint and several debtors or creditors are regarded as one person, when one of the latter has sued unsuccessfully for the debt due to them jointly and severally, or one of the former has been sued unsuccessfully for such debt.[39]

In actions *in rem* with respect to immovable property all owners of such property and their successors in title are regarded as one and the same person. Hence the judgment of a competent Court with respect to the water rights of certain riparian proprietors will be *res judicata* between and binding upon such proprietors themselves and their successors in the ownership of the riparian lands.[40]

So much for the *exceptio rei judicatæ*; we proceed now to the subject of the *exceptio litis pendentis*.

The exception or plea of *lis pendens* is the defence which is based on the fact that the same question is already pending between the same parties in another Court.[41] For the purposes of this defence an action is

[36] Voet, 44 : 2 : 5.
[37] *Paarl Pretoria Gold Mining Co.* v. *Donovan and Wolff*, *N. O.*, Barber's Transvaal Gold Law, edition of 1896, p. 64.
[38] Voet, 44 : 2 : 5.
[39] *Ibid.*
[40] *Du Toit* v. *Malherbe*, 2 Menzies, 299.
[41] V. D. L., p. 414.

regarded as pending as soon as the summons has been served on the defendant, it not being required that the declaration shall also have been served, provided it is clear from the summons itself or from the notice given to the defendant, what the cause of action is, so that he may know whether the subject-matter and the cause of action in the two suits are the same.[42]

The exception or plea in abatement must be taken at the very commencement of the action and before pleading over on the merits.[43] It will lie whenever an action is brought in one Court which is already pending in another,[44] and requires the same essentials as the *exceptio rei judicatæ*, namely, that the action must be between the same parties, must have reference to the same subject-matter, and be based upon the same grounds of action.[45]

As to the effect of this exception, De Villiers, C.J., said in the case of *Wolff, N. O.*, v. *Solomon*,[46] that he was not prepared to say that the exception would be a bar in every case where the pending suit pleaded had been instituted in a foreign Court, and in the case of *Michaelson* v. *Lowenstein*,[47] heard in the Transvaal Supreme Court, Smith, J., held that it was not an absolute bar even when the suit pleaded was not pending in a foreign Court, but that the Court had a discretion to decide whether the action brought before it should be stayed pending the action already pending, or whether it would be more just and equitable or convenient that it should be allowed to proceed. The

[42] *Nochamson* v. *Van der Westhuysen*, 24 S. C. 154; *Michaelson* v. *Lowenstein*, (1905) T. S. 328; Voet, 44 : 2 : 7; 2 : 1 : 23; V. L., vol. 2, p. 460.

[43] Voet, 44 : 2 : 8.

[44] Voet, 44 : 2 : 7.

[45] *Wolff, N. O.*, v. *Solomon*, 15 S. C. 306; Voet, 44 : 2 : 7.

[46] *Wolff, N. O.*, v. *Solomon*, 15 S. C. 306.

[47] *Michaelson* v. *Lowenstein*, (1905) T. S. 328.

words of Sir Henry de Villiers were: "Voet[48] does not touch upon the question whether, in the case of foreign litigation, a greater discretion should be allowed to the Court in regard to suits still pending in foreign Courts than in suits finally concluded in such foreign Courts. For myself, I am not prepared to say that the plea of *lis pendens* in a foreign State would be a good defence in every case in which the plea of *res judicata* in such foreign State would have been a good answer. But I do hold that the fact that a suit has been commenced by a plaintiff, and is still pending in the Court of a foreign State having jurisdiction over the defendant, affords *primâ facie* a good ground for a plea in abatement to an action instituted in this Court by the same plaintiff, against the same defendant, for the same thing and arising out of the same cause, in the absence of proof that justice would not be done without the double remedy."

The plea of *lis pendens* in a foreign Court will certainly not hold where the Courts of this country are clearly the proper tribunal for the action instituted, and the foreign Court is clearly not the proper tribunal, as, for instance, in the case of a mortgage bond executed and registered in this country.[49]

In order to avoid the exception, it will be necessary for the plaintiff to withdraw the suit instituted elsewhere, and pay all costs up to date there.[50]

[48] Voet, 44 : 2 : 7.

[49] *Buchbinder* v. *Wolff*, 18 S. C. 93.

[50] *Nochamson* v. *Van der Westhuysen*, 24 S. C. 154; *Laubscher* v. *Vigors and Fryer*, 3 Buch. 104. See also the *Queen* v. *Robertson*, 4 E. D. C. 186.

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